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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted]38

STEAMSHIP "GUL DJEMAL," HER ENGINES, BOILERS, &c.; HUSSEIN LUTFI BEY, MASTER, APPELLANT,

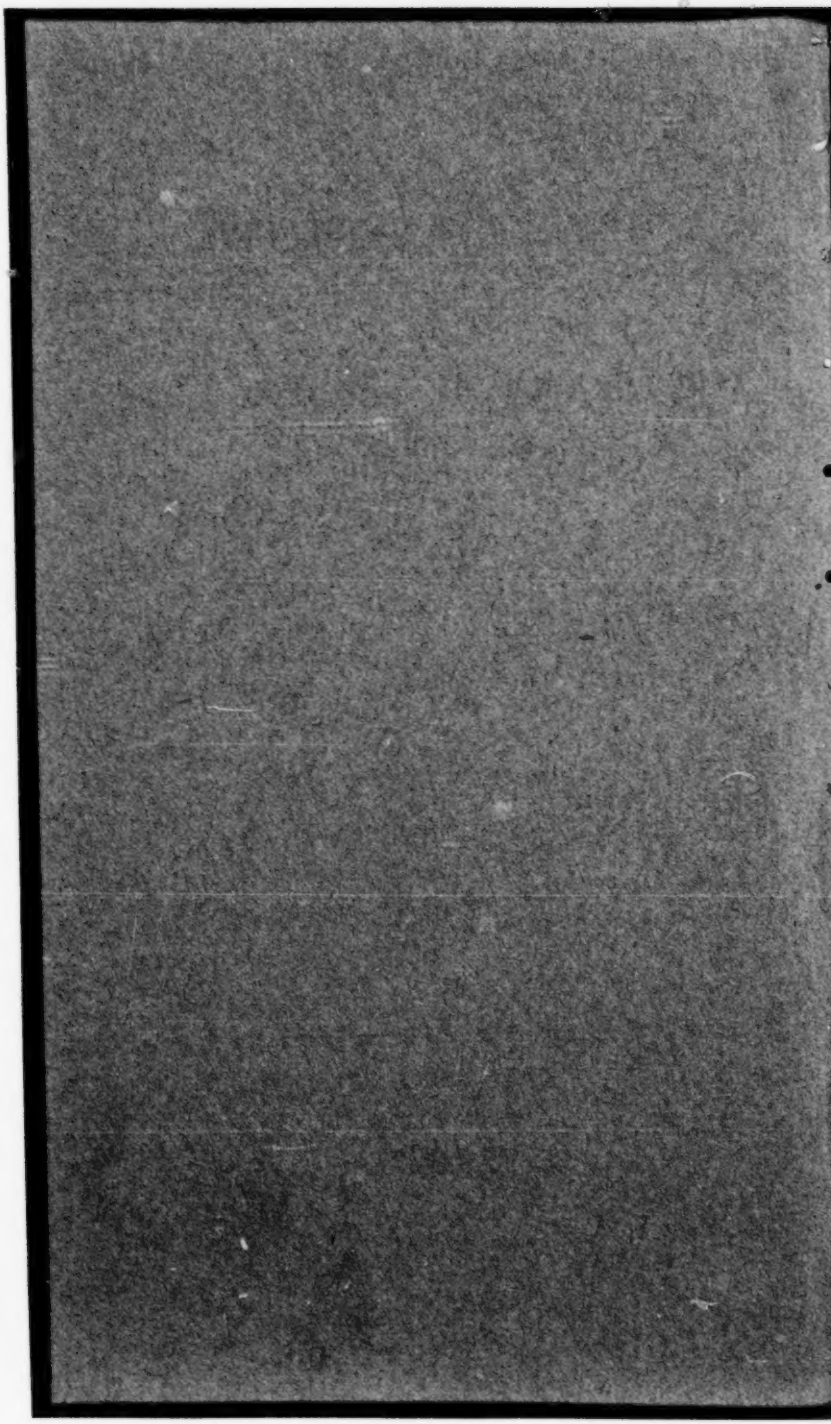
vs.

CAMPBELL & STUART, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 31, 1923.

(29,042)



(29,042)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 492.

STEAMSHIP "GUL DJEMAL," HER ENGINES, BOILERS, &c.; HUSSEIN LUTFI BEY, MASTER, APPELLANT,

vs.

CAMPBELL & STUART, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 26, 1923.

SUPREME COURT OF THE UNITED STATES.

CAMPBELL & STUART, INC.,
Libellant-Appellee,

vs.

Steamship "GUL DJEMAL", her engines, boilers, etc., HUSSEIN LUTFI BEY, Master,
Claimant-Appellant.

Statement.

1920		
Dec.	15th,	Filed libel, Monition issued, returnable December 27th, 1920.
"	27th,	Filed monition, Vessel attached December 16th, 1920.
"	27th,	Filed order allowing filing of special claim.
"	27th,	Filed Special Claim, Exception to Writ and Special Plea in abatement.
1921		
Feb.	10th,	Filed exception to special claim.
"	11th,	Filed Notice of Motion for release.
"	19th,	Filed order denying motion for release.

4	April 25th,	Filed stipulation for value.
	Nov. 19th,	Filed claim of Hussein Lutfi Bey, Master of Steamship GUL DJEMAL.
		Filed answer.
		Filed stipulation of facts.
	" 21st,	Filed notice of trial.
	1922	
	Jan. 9th,	Filed opinion, Knox, D. J., Decree for libellant signed.
	" "	Filed decree for libellant with reference to Herbert Green.
	April 19th,	Filed final decree and bill of costs.
5	June 26th,	Filed petition for appeal and allowance.
	" "	Filed assignment of errors.
	" "	Filed certificate of Knox, D. J.

Libel.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Admiralty.

6 The libel and complaint of CAMPBELL & STUART, INC., a corporation duly organized and existing under the laws of the State of New York against the S.S. *Gul Djemal,* whereof Hussein Lutfi is master, now lying in port at New York, her tackle, furniture, engines, boilers, etc., in a cause of contract, civil and maritime, alleges as follows:

FIRST: That the S. S. *Gul Djemal* in the month of November, 1920, at the time of the making of the repairs and furnishing of the supplies hereinafter set forth being in

the port of New York within the admiralty and maritime jurisdiction of this Honorable Court, and standing in need of certain repairs and supplies to render her fit and seaworthy for her intended voyage in and upon the Atlantic Ocean, the libelant at the request of said Hussein Lutfi, the master of the said vessel, furnished the materials and made the repairs, the particulars whereof are set forth in a schedule hereto annexed and made a part hereof, and marked "Schedule A". 7

SECOND: That the libelant, during the said month of November, 1920, repaired and tested the boilers and fire hose of said Steamship, and furnished her with certain material, to wit: fresh water, and labor in connection with the making of said repairs, the particulars of which supplies and repairs fully appear in said "Schedule A", hereto annexed, amounting in the whole to the sum of Three Hundred and Seventy-five dollars and fifty cents ($375.50). 8

THIRD: That the said supplies and labor and materials furnished were necessary for the said Steamship, and that the supplies were furnished and work done on her credit as well as of her owners and master, and the said libelant claims a maritime lien on said Steamship, her tackle, apparel, furniture, etc., for the payment of the said sum under the Federal Statute entitled "An Act Relating to Liens on Vessels for Necessaries, Supplies or Other Necessities," approved June 23, 1910. 9

FOURTH: That said Steamship is a foreign vessel belonging, as libelant is informed and verily believes, to the

10 port of Piraeus, Greece, and that neither the master of said Steamship or her owners have ever paid to your libelant said sum of money or any part thereof, but have hitherto wholly neglected and refused so to do, although payment of said sum has been duly demanded by your libelant.

FIFTH: That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this Honorable Court, and that said Steamship is now in the port of New York in the Southern District of New
11 York.

WHEREFORE, the libelant prays that process of attachment in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said S. S. *Gul Djemal*, her tackle, apparel, furniture, engines, boilers and machinery, and that the said Hussein Lutfi, Master, and all other persons having or pretending to have any right, title or interest in said Steamship, may be cited to appear and answer all and singular the matters aforesaid, and that said steamer may be condemned and sold to pay the
12 demands and claims aforesaid with interest and costs, and that the libelant may have such other and further relief as in law and justice it may be entitled to receive.

BARKER, DONAHUE, ANDERSON & WYLIE,
Proctors for Libelant,
O. & P. O. Address,
27 William Street,
Borough of Manhattan,
New York City.

STATE OF NEW YORK,
County of New York, } ss.: 13

JAMES P. STUART, being duly sworn, deposes and says that he is the Vice President of CAMPBELL & STUART, INC., the libelant in the above named libel, and that the foregoing libel is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and as to those matters, he believes it to be true.

Deponent further says that the reason why this verification is not made by the libelant, is that it is a corporation; that this deponent is an officer of the same, to wit: 14
its Vice President, and that the seal affixed to the said libel is the corporate seal of the said corporation, and was affixed thereto by authority of said corporation; and that deponent signed the said libel as such Vice President by like authority; and that the grounds of deponent's belief as to all matters in said libel not therein stated upon his knowledge, are as follows: to wit:—Information obtained from the records and books of account of said libelant.

JAMES P. STUART. 15

Subscribed and sworn to before me
this 15th day of December, 1920.
EDNA K. BLACK,
Notary Public,
Residing in Kings County,
Certificate Filed in New York Co.
Clerk's No. 105, Register's No. 1231.
Commission expires Mar. 30, 1921.

16

"SCHEDULE A"

S. S. "GUL DJEMAL"

In Account with
CAMPBELL & STUART, INC.

1920		
Nov. 1.	To Fresh Water Supplied:	
	125 tons at 45c per ton.....	$56.25
	4 hours detention at $15.00 per hour	
17	waiting to pump out tanks.....	60.00
Nov. 5.	To Fresh Water Supplied:	
	Testing 3 boilers at $25.00 each.....	75.00
	65 tons of water at 45c per ton.....	29.25
	4 hours detention at $15.00 per hour...	60.00
Nov. 8.	To Fresh Water Supplied:	
	Testing 2 boilers at $25.00 each.....	50.00
	Testing Fire Hose	15.00
	2 hours detention at $15.00 per hour...	30.00
		$375.50

18

19

Monition.

SOUTHERN DISTRICT OF NEW YORK, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA, To the Marshal of the Southern District of New York, Greeting: Whereas, a Libel hath been filed in the DISTRICT COURT OF THE UNITED STATES for the Southern District of New York, on the 15th day of December in the year of our Lord one thousand nine hundred and twenty by

20

CAMPBELL & STUART, INC.,

against

Steamship "GUL DJEMAL"

in a cause, civil and maritime, for damages for breach of contract for $375.00, for the reasons and causes in the said libel mentioned, and praying the usual process or monition of the said Court in that behalf to be made, and that all persons interested in the said steamship or vessel, her tackle, &c., may be cited in general and special to answer the premises, and all proceedings being had that 21
the said steamship or vessel, her tackle, &c., may for the causes in the said petition mentioned be condemned and sold to pay the demands of the Libellant.

YOU ARE THEREFORE HEREBY COMMANDED to attach the said steamship or vessel, her tackle, &c., and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say

22 why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court, to be held in and for the Southern District of New York, on the 27th day of December, 1920, at 10.30 o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

23

WITNESS, the HON. LEARNED HAND, Judge of the said Court, at The City of New York, in the Southern District of New York, this 15th day of December in the year of our Lord one thousand nine hundred and twenty and of our Independence the one hundred and forty-fifth.

ALEX. GILCHRIST, JR.,
Clerk.

BARKER, DONOHUE, ANDERSON & WYLIE,
Proctors for Libellant.

24

District Court of
the United States
Southern District of N. Y.
SEAL

In obedience to the within Monition I attached the Steamship GUL DJEMAL, her engines, &c., therein described, on the 16th day of December, 1920, and have given due notice by proof of publication hereto annexed to all persons claiming the same, that this Court will on the 27 day of December, 1920, inst. (if that day shall be a day of jurisdiction, if not, on the next day of jurisdiction thereafter) proceed to the trial and condemnation thereof, should no claim be interposed for the same. 25

THOMAS D. McCARTHY,
U. S. Marshal.

Dated December 27th, 1920. 26

27

28

Order allowing filing of Special Claim and Exceptions to Writ without Stipulation for Costs, for a Stay, &c.

At a Stated Term of the District Court of the United States for the Southern District of New York, held in the Court Rooms thereof, U. S. Post Office Building, in the Borough of Manhattan, City of New York, on the 26 day of January, 1921.

Present—

29

HONORABLE JOHN C. KNOX,
United States District Judge.

CAMPBELL & STUART, INC.,
Libelant,

against

STEAMSHIP GUL DJEMAL, her engines, boilers, etc.

30

It appearing to the Court that Hussein Lutfi Bey, as master of the steamship *Gul Djemal,* by his proctors Purrington & McConnell appearing specially for the purpose of objecting to the jurisdiction of the court and to the arrest of the steamship *Gul Djemal,* and for no other purpose, has filed a special claim to said steamship and a special plea in abatement for the purposes of claiming the immunity of the said steamship from arrest and the

other purposes in the said claim mentioned, and has filed 31
exceptions to the libel on the ground that the steamship *Gul Djemal* is immune because she is, and at the time of her arrest under process herein was, in the possession of and owned by the Turkish Government, and, among other prayers, has prayed that if the libelant herein desires to contest the facts set forth in the said claim, the libelant be required within seven days from the filing of the said claim to file a traverse thereof, or be forever foreclosed from challenging the facts therein stated, and after hearing John M. Woolsey of Counsel appearing specially in support of the prayers thereof and George 32
S. Brengle in opposition thereto.

It is now by the Court

ORDERED

1. That the said claim and exceptions be allowed to be filed without the filing of any stipulation or security for costs.

2. That if the libelant herein desires to contest the sufficiency of the allegations of fact set forth in said claim to constitute a ground for the immunity of said 33
steamship *Gul Djemal* from the process of this Court or to challenge the truth of the facts therein set forth, the libelant is required, within seven days from the service of a copy of this order and of said special claim and exceptions on the said libelant or its proctors, to except, demur or otherwise plead to said special claim, failing which the libelant shall be forever foreclosed from challenging the facts in said claim stated.

34 3. That all proceedings herein be stayed pending a hearing, decision and order or decree on any issues of law or fact which may be raised by said claim and any exception, demurrer or plea thereto which the libelant may make.

4. That the time of the steamship *Gul Djemal* to answer or otherwise plead to the libel herein be, and it hereby is, extended for a period of 20 days after decision on said hearing and entry of order or decree thereon.

35 5. That any hearing to be had on the said claim and the issues which are to be raised by any traverse thereto shall be heard in open Court before one of the Judges of this Court, and that on the said hearing the evidence shall be strictly limited to the issues which are raised with regard to the questions of ownership and possession of the said steamship and of her immunity from the process of this Court.

JOHN C. KNOX,
U. S. D. J.

36

37

Special Claim and Exception to the Writ and Special Plea in Abatement.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CAMPBELL & STUART, INC.,
Libellant,

against

S.S. "GUL DJEMAL", her engines, boilers, etc

38

And now comes Hussein Lutfi Bey, intervening and appearing specially as master of the steamship *Gul Djemal* for the interests of the Turkish or Ottoman Government, in the said steamship *Gul Djemal,* etc. as the same are arrested or attached by the Marshal under process of this Court at the instance of CAMPBELL & STUART, INC., for the purpose of objecting to the arrest, seizure and detention of the said steamship *Gul Djemal* under writs of arrest which have been issued herein, solely for the purpose of claiming immunity from arrest for the said steamship, on the ground that the said steamship *Gul Djemal* is owned by and in the exclusive possession of the Turkish or Ottoman Government a Foreign Sovereign at peace with the United States and in the service of the Turkish Government and under its exclusive direction and control.

39

40 And the said Hussein Lutfi Bey avers:

1. That he is and at the time of said arrest was the master of the said steamship *Gul Djemal*, etc.

2. That, at the time of the arrest of said steamship, he was, and still is, employed and paid by the Turkish Government.

3. That at the time of said arrest he was in lawful possession of the said steamship *Gul Djemal* as master and agent and representative of the Turkish Government.

41

4. That the Turkish or Ottoman Government is the true and *bona fide* owner of the said steamship and is now and at all the times mentioned in the libel and at the time of the issuance of process herein and of the arrest of the *Gul Djemal* under process of this Court a Foreign Sovereign at peace with the United States.

5. That no other person, corporation or government is the owner thereof, and

6. That as master he is the true and lawful bailee of
42 the said steamship as representative and agent of the Turkish Government and, as such, entitled to the immediate possession thereof free of all liens, arrests, attachments, libels or claims;

WHEREFORE he prays to be admitted to file his claim solely for the purpose hereinabove mentioned without filing any stipulation or security for costs.

AND FOR EXCEPTIONS to the jurisdiction of this Court by the said Writ of Arrest or Attachment and proceedings had thereon and as a special plea in abatement herein, the special claimant respectfully avers: 43

1. That at the time when the process was served upon the said steamship *Gul Djemal* she was, and is now, a vessel owned by and in the exclusive possession of the Turkish or Ottoman Government and under its exclusive direction and control, and

2. That the said Turkish or Ottoman Government is a Foreign Sovereign with whom the United States is now, and at all the times mentioned in the libel, and at the time of the issuance of process herein and of the arrest of the steamship *Gul Djemal* under process of this Court was at peace. 44

WHEREFORE this claimant and exceptant appearing specially solely for the purpose and reasons as above stated alleges,

That the steamship *Gul Djemal* is, and should be declared, immune from arrest under process of this court for the reasons hereinabove stated, namely, that at time of the arrest that she was and is now owned by and in exclusive possession of a foreign Sovereign Government at peace with the United States, 45

And prays

1. That the court will quash the said writ of arrest or attachment and the process issued thereunder, and release the steamship *Gul Djemal* at once from the arrest or attachment and from the custody of the Marshal and deliver her to this special claimant; or

46 2. That if the libelant herein desires to contest any question of law hereby raised or any of the facts herein set forth, the libelant be required within seven days from the filing hereof to file a traverse hereof or be forever foreclosed from challenging the facts herein stated.

3. That all proceedings herein be stayed pending a hearing on the issues of the ownership and possession of the said steamship and any other issues hereinabove raised, and that such hearing be limited to such issues only.

47 4. That this special claimant be not required to file any stipulation or other security for costs herein, and

5. That this special claimant have such other or further relief as may be just in the premises.

HUSSEIN LUFTI BEY

Master appearing and claiming specially for the purposes above named only and for no other purposes whatsoever.

Subscribed and sworn to before me this 26th day of January, 1921.

JAMES D. BROWN

48 Notary Public, New York County,
County Clerk's No. 623 Register's No. 1651

(Seal)

PURRINGTON & MCCONNELL,

Proctors for Hussein Lutfi Bey, appearing specially for the purposes of objecting to the jurisdiction of the Court and to the arrest of the steamship *Gul Djemal* as above stated, and for no other purpose.

49

Exception to the Special Claim, etc.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CAMPBELL & STUART, INC.,
Libellant,

against

S.S. "GUL DJEMAL", her engines, boilers, etc.

50

To the Honorable, the Judges of the District Court of the United States for the Southern District of New York:

The exception of Campbell & Stuart, Inc., libellant, to the Special Claim and Exception to the Writ and Special Plea in Abatement of Hussein Lutfi Bey, alleges as follows:

That it is alleged in the Special Claim and Exception to the Writ and Special Plea in Abatement that the Steamship *Gul Djemal* is owned and possessed by the Turkish or Ottoman Government. 51

As an exceptive allegation:

That the Turkish or Ottoman Government has heretofore and before the filing of the Libel herein severed diplomatic relations with the United States of America; that said diplomatic relations between the said Turkish

52 or Ottoman Government and the United States of America have not since been resumed; and that the property of the Turkish or Ottoman Government is not entitled to immunity as prayed for.

WHEREFORE, the libellant prays that the Exception to the Writ and the Special Plea in Abatement may be dismissed, and the libellant further prays that, if the said Claim, Exception and Special Plea are not dismissed, libellant may be granted leave to answer said Claim, Exception and Special Plea.

53 BARKER, DONAHUE, ANDERSON & WYLIE,
Proctors for the Libellant,
Office & P. O. Address,
27 William Street,
New York City.

54

55

Motion for Release of Steamship from Arrest or Attachment Herein.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CAMPBELL & STUART, INC.,
Libellant,

against

S.S. "GUL DJEMAL", her engines, boilers, etc.

56

Sirs:

PLEASE TAKE NOTICE that on the special claim and exception to the writ and the special plea in abatement heretofore filed herein by Hussein Lutfi Bey, master of the steamship *Gul Djemal*, appearing specially for the purposes stated in said special claim and for no other purposes, and the exception and exceptive allegation of the 57
libellant thereto, we shall on Thursday, February 10th, 1921, at the Chambers of the Honorable John C. Knox, United States District Judge for the Southern District of New York, at 2 o'clock P. M., or so soon thereafter as counsel may be heard, move—

1. That the steamship *Gul Djemal* be formally released from seizure.

58 2. That process against the said vessel as the same is issued by this Court at the instance of Campbell & Stuart, Inc., be quashed.

3. That the said steamship *Gul Djemal* be declared immune from arrest under process of this Court because she is a vessel owned by and under the direction and control and in the exclusive possession of the Turkish or Ottoman Government, a foreign sovereign at peace with the United States.

59 4. That the said vessel be delivered to this special claimant as master thereof in the employ of the Turkish or Ottoman Government.

5. That this special claimant shall have such other or further relief as may be just in the premises.

PURRINGTON & MCCONNELL,
Proctors for Hussein Lutfi Bey, appearing specially for the purpose of objecting to the jurisdiction of this Court and to the arrest of the steamship *Gul Djemal*
60 under writ of this Court and for no other purpose.

61

Order Denying Motion for Release.

At a Special Term of the United States District Court for the Southern District of New York, held in the Court Rooms thereof, U. S. Post Office Building, in the Borough of Manhattan, City of New York, on the 19th day of February, 1921.

Present—Honorable John C. Knox,
United States District Judge.

62

Campbell & Stuart, Inc.,
Libellant,

against

S.S. "Gul Djemal", her engines, boilers, etc.

63

On reading the special claim and exception to the writ and special plea in abatement of Hussein Lutfi Bey, master of the steamship *Gul Djemal;* the order allowing the filing of same, dated January 26th, 1921; and the exception or traverse of the libellant thereto; and the notice of Purrington & McConnell, proctors for Hussein Lutfi Bey, appearing specially for the sole purpose of objecting to the jurisdiction of this court and to the arrest of the steamship *Gul Djemal* under writ of this court, and for no other purpose, filed February 10th,

64 1921; and after hearing John M. Woolsey, Esq., of counsel, appearing specially in support of the special claim and exception to the writ and special pleas in abatement and the prayers thereof and for the motion to release the *Gul Djemal* from arrest or attachment herein and Harold V. Amberg, Esq., of counsel, in opposition thereto, and upon all the proceedings heretofore had herein, it is, now

BY THE COURT ORDERED:

65 I. That the motion for the release of the steamship from arrest or attachment herein be, and it is hereby denied; and

II. That the exception to the special claim and exception to the writ and special plea in abatement be, and it is hereby sustained; and further

III. That, as a petition is about to be presented by the master of the steamship *Gul Djemal*, specially appearing, to the United States Supreme Court at Washington for a writ of prohibition and/or mandamus, to this
66 court herein, all proceedings against the steamship *Gul Djemal*, her owner, master, etc. be stayed until the hearing and determination upon the said writ or writs by the United States Supreme Court, and the receipt by the District Court of a mandate thereon, provided that if such application is not made to the Supreme Court on or before Monday, March 7, 1921, this stay shall not continue except on good cause shown.

JNO. C. KNOX,
U. S. D. J.

67

Stipulation for Value
Entered into Pursuant to the Rules and Practice
of this Court.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Filed and recorded the day of , 1921.

68

WHEREAS, a libel was filed on the 2nd day of December, 1920 by Campbell & Stuart, Inc., as libellant, against the steamship *Gul Djemal*, for the reasons and causes in the said libel mentioned; and whereas the said vessel is in the custody of the Marshal under process issued herein:

And, Whereas, a special claim to the vessel and an exception to the writ and a special plea in abatement to the libel has been filed by Hussein Lutfi Bey, as master of the steamship *Gul Djemal*, appearing specially for 69
the special and sole purpose of claiming the immunity of the steamship *Gul Djemal* on the ground that she is owned by and in the possession of the Turkish Government and of objecting for that reason to the jurisdiction of this Court and to the arrest of the said steamship under the writ of this Court and for no other purpose, and the value of the said steamship herein having been fixed in the sum of $375.50 for the purpose of bonding

in this suit as appears by the stipulation at the foot hereof, and the Indemnity Insurance Company of North America hereby consenting and agreeing that unless it is finally decided by this Court, and/or any Appellate Court and/or the Supreme Court of the United States, that the steamship *Gul Djemal* is immune from the process of this Court and the special plea in abatement is sustained in case of default or contumacy on the part of the said Hussein Lutfi Bey, special claimant aforesaid, and/or in the case of default or contumacy on the part of the stipulator, Indemnity Insurance Company of North America, in regard to any of the conditions and/or agreements of this stipulation, execution for the above agreed amount with interest thereon from this date may issue against its goods, chattels and lands.

And, Whereas, in the event that this Court, or an Appellate Court, or the Supreme Court shall decide, by a final decision, that the libellant may proceed against the said steamship *Gul Djemal*, the special claimant and/or his stipulator do hereby jointly and severally agree to file, immediately after such decision, a general claim for the defense of this suit, and the special claimant and/or his stipulator do hereby jointly and severally agree that in default of filing such claim, their default and the default of each of them may be taken upon ten (10) days' notice in writing to the present proctors for the claimant; provided nothing in this clause contained to be construed as preventing the special claimant from insisting upon the immunity of the said steamship up to such time as the immunity question herein shall have been decided by this Court and/or by any Appellate Court and/or by the Supreme Court by a final decree.

Now, Therefore, the condition of this stipulation is 73
such that (1) if the steamship *Gul Djemal* is finally held to be immune from process of this Court by this Court and/or by any Appellate Court and/or by the Supreme Court of the United States, (2) or if the special claimant herein and the Indemnity Insurance Company of North America, having an office and principal place of business at #122 William St., Borough of Manhattan, in the City of New York, the undersigned hereon, abide by all the orders of the Court, interlocutory or final, and pay the amount awarded by the final decree rendered by this Court, or by any Appellate Court, if an appeal 74
intervene, with interest, then this stipulation to be void, otherwise to remain in full force and virtue.

H. LUTFI,
As Master of the Steamship *Gul Djemal* appearing specially for the purpose of claiming immunity and for no other purpose.

Taken and acknowledged this
day of April, 1921,
before me.

75

Minnesota ... St. Paul, Minn.

76

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA

By GEO. H. SCHNEIDER,
Resident Vice President.

Attest: E. M. MCCARTHY, . .
Resident Assistant Secretary.

The value of the said vessel is hereby fixed for the purpose of bonding in this suit at the sum of $375.50 and the foregoing stipulation is approved as to form, amount
77 and sufficiency of surety.
New York, April 18th, 1921.

BARKER, DONAHUE, ANDERSON & WYLIE,
Proctors for Libellant.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA

AFFIDAVIT, ACKNOWLEDMENT AND JUSTIFICATION BY
78 GUARANTEE OR SURETY COMPANY

STATE OF NEW YORK }
County of New York } SS.:

On this 14th day of April one thousand nine hundred and twenty-one before me personally came GEO. H. SCHNEIDER, known to me to be the Resident Vice-President of the INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, the corporation described in and which executed

the within and foregoing Bond of HUSSEIN LUTFI BEY, 79
Claimant of *s. s. Gul Djemal* as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of NEW YORK, State of NEW YORK; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, is duly and legally incorporated under the laws of the State of Pennsylvania; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of HUSSEIN LUTFI BEY, Claimant of *s. s. Gul Djemal* is the corporate seal 80
of said INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, and was thereto affixed by the order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with E. M. MCCARTHY and knows him to be the resident Assistant Secretary of said Company; that the signature of said E. M. MCCARTHY subscribed to said Bond is in the genuine handwriting of said E. M. MCCARTHY, and was thereto subscribed by order and authority of said Board of Directors; and in the presence of said deponent; that 81
the assets of said Company, unencumbered and liable to execution, exceed its debts and liabilities of every nature whatsoever, by more than the sum of One Million Five Hundred Thousand ($1,500,000) Dollars.

82 That WM. A. THOMPSON is the agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

GEO. H. SCHNEIDER.

Sworn to, acknowledged before me, and subscribed in my presence this 14th day of April, 1921.

CHARLES J. KOCH,
Notary Public, for Kings County, No. 41
Certificate filed in New York County,
No. 98.

83 Indemnity Insurance Company
Seal of North America
Incorporated Pennsylvania
1920

(Cover stamped) U. S. District Court
Filed
Apr. 25th, 1921.
S. D. of N. Y.

84

Claim of Hussein Lutfi Bey, Master of S.S. "Gul Djemal." 85

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CAMPBELL & STUART, INC.,
Libellant,

against

S.S. "GUL DJEMAL", her engines, boilers, etc. 86

And now comes Hussein Lutfi Bey, intervening and appearing as master of the steamship *Gul Djemal* for the interests of the Turkish or Ottoman Government, in the said steamship *Gul Djemal,* etc., as the same are arrested or attached by the Marshal under process of this Court at the instance of Campbell & Stuart, Inc., and appears before this Honorable Court and makes claim to the steamship *Gul Djemal,* her engines, boilers, etc., as the 87
same are proceeded against in this Court at the instance of Campbell & Stuart, Inc., and that as master he is the true and lawful bailee of the said steamship as representative and agent of the Turkish Government and, as such, entitled to the immediate possession thereof free of all liens, arrests, attachments, libels or claims:

WHEREFORE, he prays to defend accordingly, without prejudice to the claim of immunity of the *Gul Djemal* from

88 suit heretofore asserted, and herein now reasserted by the Turkish Government, a foreign sovereign.

HUSSEIN LUTFI BEY,
Master of s.s. *Gul Djemal.*
By FRANK J. MCCONNELL,
Proctor for Claimant.

Subscribed and sworn to before me
this 19th day of November, 1921.
JAMES D. BROWN,
Notary Public,
89 New York County.
County Clerk's No. 493.
Register's No. 3278.
(Seal)

STATE OF NEW YORK,
County of New York, } ss.:

FRANK J. MCCONNELL, being duly sworn, deposes and says:

That he is one of the proctors for the claimant herein; that he has read the foregoing claim and knows the
90 contents thereof; that from statements and affidavits made to him by Captain Hussein Lutfi Bey, deponent believes that the said claim is true; that the reason why this affidavit is made by deponent and not by claimant, is because claimant, representing the Turkish Government, is now in Constantinople, Turkey, and that prior to his departure Captain Hussein Lutfi Bey requested deponent to take any and all steps to protect his interests or the interests of the Turkish Government and the Ad-

ministration Seire-Seffain, and to sign any and all documents on his behalf, necessary to effect that end. 91

FRANK J. McCONNELL.

Sworn to before me this 19th day of November, 1921.
JAMES D. BROWN,
Notary Public,
New York County.
County Clerk's No. 493.
Register's No. 3278.
(Seal)

92

Answer of Hussein Lutfi Bey.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of Hussein Lutfi Bey, Master and Claimant of the Turkish Government steamship *Gul Djemal,* claiming the vessel on behalf of her owner, and Administration Seire-Seffain, an integral part of the Turkish Government, and a branch of the Ministry of Marine, to the libel and complaint of CAMPBELL AND STEWART, INC., in an alleged cause of contract, civil and maritime, alleges and respectfully shows to this Honorable Court as follows: 93

FIRST: Claimant denies that the steamship *Gul Djemal* is within the admiralty and maritime jurisdiction of this Honorable Court, as is alleged in Article First

94 of the libel. Claimant admits the other allegations of Article First of the libel contained.

SECOND: Claimant admits the allegations in Article Second of the libel contained.

THIRD: Claimant admits the allegations in Article Third of the libel contained.

FOURTH: Claimant denies that the steamship *Gul Djemal* belongs to the port of Piraeus, Greece. Claimant admits the other allegations in Article Fourth of the
95 libel contained.

FIFTH: Claimant denies the admiralty and maritime jurisdiction of this Honorable Court and further denies that all and singular the premises of the libel, except as they are expressly admitted herein, are true, as alleged in the Fifth Article thereof.

SIXTH: Further answering the said libel, claimant alleges that the steamship *Gul Djemal* is and at all the times mentioned in the libel was immune from seizure under process of this Court, as a vessel owned, manned,
96 operated by and in the possession of the Turkish or Ottoman Government, being operated by the Administration Seire-Seffain, through the Ministry of the Marine, an integral branch of the Turkish Government, the Administration Seire-Seffain also being attached to the Ministry of War; and that said vessel is not subject to the jurisdiction of this Honorable Court, because of her ownership by the Turkish or Ottoman Government, a foreign sovereign government at peace with the government

of the United States of America, and that by reason thereof, this Court is without jurisdiction to proceed in this cause. 97

SEVENTH: All and singular the premises are true.

WHEREFORE: Claimant, prays that the libel herein be dismissed with costs.

PURRINGTON & MCCONNELL,
Proctors for Hussein Lutfi Bey, Claimant,
52 Wall Street,
New York City. 98

STATE OF NEW YORK, }
County of New York, } ss.:

FRANK J. MCCONNELL, being duly sworn, deposes and says:

I am a member of the firm of Purrington & McConnell, proctors for the claimant herein. I have read the foregoing answer and know the contents thereof and the same is true of my own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters I believe it to be true. 99

The sources of my information and the grounds for my belief as to the matters therein stated to be alleged on information and belief, are interviews with the master of the s.s. *Gul Djemal* and cablegrams from the Director of the Administration Seire-Seffain at Constantinople.

The reason why this verification is made by me and not by the claimant, is because the latter is the repre-

100 sentative of the Turkish Government, and now is in Turkey.

FRANK J. McCONNELL.

Sworn to before me this 19th day of November, 1921.
JAMES D. BROWN,
Notary Public,
New York County.
County Clerk's No. 493.
Register's No. 3278.
(Seal)

101

Stipulation of Facts.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CAMPBELL & STUART, INC.,
Libellant,

against

102

The S.S. "GUL DJEMAL", her engines, boilers, etc.

WHEREAS, since the proceedings heretofore had, in the District Court for the Southern District of New York, and in the Supreme Court of the United States, arising out of libels filed in this and other actions against the steamship *Gul Djemal*, the depositions *de bene esse* of

Hussein Lutfi Bey, master of the *Gul Djemal* and claimant herein, Socrates Gabrielides, Ali Raghib, Nahib Souliman, Moustafa Nazim and Souliman Gadri have been taken herein, and voluminous documents have been marked in evidence during the taking of said depositions; and 103

WHEREAS, proctors for the parties have agreed, for the purpose of saving expense, to enter into a stipulation as to the facts developed by said depositions, in respect of the status and control of the *Gul Djemal,* and as to other facts of which this Court has heretofore taken judicial notice; 104

NOW, THEREFORE,

IT IS STIPULATED by and between the libellant and said claimant, by their respective proctors:

FIRST: That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal,* the *Gul Djemal* was owned by the Turkish or Ottoman Government, that it flies the Turkish flag; that Turkey has but one flag, for both national and commercial uses; 105 that it is registered in the name of Seire-Seffain Administration; that the *Gul Djemal* is the absolute property of the Ottoman Seire-Seffain Administration, the third division of the Ministry of Marine of the Turkish Government, which is attached to the Ministry of War; that the maritime title has been given to the Administration Seire-Seffain by the Ministry of War. Said Seire-Seffain Administration, at the times above mentioned, was (and

106 is) the Transport Section of the Ministry of Marine, and was (and is) charged with the control of transport vessels of the Turkish Government, and said vessels, (of which the *Gul Djemal* was one) which are capable of commercial uses, are, when not used as transports, used in commerce; whether such vessels are used as transports or in commerce is subject to the direction of the Ministry of Marine, which, through departments other than the Seire-Seffain has charge of battleships, artillery, torpedos, wireless, and engineering work pertaining to all the vessels of the Turkish Navy; that the *Gul Djemal* was
107 transferred for operation to the Administration Seire-Seffain from the Ministry of War in 1914 and has since been under the control of Administration of Seire-Seffain.

Said Seire-Seffain Administration, at the times above mentioned, had (and has), as its head, a military officer of the Turkish Government, in the active or reserve service of the Turkish Government, and said head must be, at all times, a military officer in the employ of the Turkish Government, the Seire-Seffain Administration being charged with the transport of troops, and at all the times
108 above mentioned, said head of the Seire-Seffain Administration was a Colonel; although said head of the Seire-Seffain Administration, at the times above mentioned, was, in respect of the *Gul Djemal*, not functioning in a military or naval capacity.

Second: That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was in the possession of the Turkish Government, being manned by a master, officers and crew em-

ployed by or under the direction of said Seire-Seffain Administration, and paid by the Treasury Department of the Turkish Government through the Administration Seire-Seffain; said master, at the times above mentioned, was (and is) a reserve officer in the Turkish Navy employed by the branch of the Ministry of Marine known as the Administration Seire-Seffain, and the navigating officer was a Lieutenant in the active service of the Turkish Navy, both detailed by the said Ministry of Marine to serve on the *Gul Djemal* during the times above mentioned, but in such service they were not performing any naval or military functions, although they were subject to any orders from the department of the Turkish Government charged with naval or military affairs; the other officers and entire crew of the *Gul Djemal*, during the times above mentioned, were civilians, paid by the Turkish Government. 109 110

THIRD: That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was engaged in commercial trade, under charter for one round voyage to George Dedeoglou, who engaged to carry passengers and goods for hire, and in such trade the *Gul Djemal* was not functioning in a naval or military capacity, nor was there anything of a naval or military character connected with the voyage of the *Gul Djemal* from Constantinople to New York and return. 111

FOURTH: That the Turkish Government, prior to the time mentioned in the libel herein, had severed diplomatic relations with the United States of America, ad-

112 vising its peoples by proclamation, however, that American institutions should not be molested but should be treated as heretofore; that said diplomatic relations have not been resumed; although the United States of America maintains unofficial relations with the Turkish Government by American Consular representatives, and through the medium of a High Commissioner; that during said period of the severad relations, the Spanish Ambassador to the United States has represented, and still represents, Turkish interests in the United States, and has been recognized as such representative by the Department of
113 State of the United States of America.

FIFTH: That the Turkish or Ottoman Government, and the Government of the United States of America, are sovereign governments, and were at all the times mentioned herein, at peace with each other, although the Turkish or Ottoman Government was and is an ally of the enemy of the United States in the World War.

BAKER, DONAHUE, ANDERSON & WYLIE,
Proctors for Libellant.

114 PURRINGTON & MCCONNELL,
Proctors for Claimant.

115

Opinion of Knox, D. J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CAMPBELL & STUART, INC.,
Libelant,

against

The S/s GUL DJEMAL, her engines, boilers, etc.

116

BARKER, DONAHUE, ANDERSON & WYLIE
(HARRINGTON, BIGHAM & ENGLAR, of Counsel),
for Libelant;

PURRINGTON & MCCONNELL,
for Claimant.

KNOX, D. J.: Since this litigation was before me the proctors for the respective parties have entered into a stipulation of facts, of which the following two paragraphs are a part: 117

> "THIRD:—That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was engaged in commercial trade, under charter for one round voyage to George Dedeoglou, who engaged to carry passengers and goods for hire, and in such

118 trade the *Gul Djemal* was not functioning in a naval or military capacity, nor was there anything of a naval or military character connected with the voyage of the *Gul Djemal* from Constantinople to New York and return.

"Fourth:—That the Turkish Government" (which owned the *Gul Djemal* and had on board a master, officers and crew employed by or under direction of Seire-Seffain Administration, and paid by the Treasury Department of the Turkish Government through the Administration Seire-Seffain, a branch of the Ministry of Marine) "prior to the time mentioned in the libel herein,
119 had severed diplomatic relations with the United States of America, advising its peoples by proclamation, however, that American institutions should not be molested but should be treated as theretofore; that said diplomatic relations have not been resumed; although the United States of America maintains unofficial relations with the Turkish Government by American Consular representatives, and through the medium of a High Commissioner; that during said period of the severed relations, the Spanish Ambassador to the United States has represented, and still repre-
120 sents, Turkish interests in the United States, and has been recognized as such representative by the Department of State of the United States of America."

Upon the facts so stipulated I now definitely hold that the "Gul Djemal" was not immune from seizure upon process issued at the instance of libelant.

Were I to follow my own inclination I should not amplify this declaration, and would sign the interlocutory decree submitted by libelant. Proctors for claim-

ant, however, have requested that I give some further 121
expression of my reasons for holding the vessel. Being perhaps under some obligation to furnish counsel with a target at which to direct their fire in the appellate court, I shall briefly comply with their request. In so doing I am greatly aided by the able opinion filed by Judge Mack in Luzzato & Sons *v.* S. S. "Pesaro" upon October 1, 1921. Judge Mack there said:—

> "If, as I believe, sound principles of admiralty jurisprudence require that a ship be treated as an entirety separate and distinct from her owner, the immunity of a public ship should depend primarily 122
> not upon her ownership but upon the nature of the service in which she is engaged and the purpose for which she is employed. That is a distinction or standard towards which Bynkershoek, Marshall and Stowell tended and in favor of which there is not only the specific authority of Story and Phillimore but the force of judicial analogy and the requirements of modern economic life."

Further on in the opinion it was said:—

> "To deprive parties injured in the ordinary course of trade of their common and well established legal remedies would not only work great 123
> hardship on them, but in the long run it would operate to the disadvantage and detriment of those in whose favor the immunity might be granted. Shippers would hesitate to trade with government ships, and salvors would run few risks to save the property of friendly sovereigns, if they were denied recourse to our own courts and left to prosecute their claims in foreign tribunals in distant lands."

124 There is little or nothing that I can add to what has been quoted, and which, to me, is quite sufficient for the purposes of the present decree. I will, however, observe that in my judgment a government which makes it possible, as here, for an individual, who is hedged about with no special immunities or prerogatives, to use sovereign property for purposes of trade and commerce, and in competition with that of private owners, has brought itself squarely within the declaration of the Supreme Court in Bank of U. S. *v.* Planters' Bank of Georgia, 9 Wheaton, 904, where it was said, "It is, we think, a sound principle
125 that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates and to the business which is to be transacted." The existing immunities and prerogatives of governments are all but too extensive, and the one here claimed should not be permitted to destroy, as it would, the basic principle that in trade and commerce there should be for the per-
126 sons engaged therein a fair field and no favors. So much for the facts disclosed by paragraph "Third" of the stipulation.

But irrespective of what has already been said, I am of opinion that at the time of the seizure of the *Gul Djemal* she enjoyed no immunity from such restraint, inasmuch as diplomatic relations between the United States and Turkey were then severed, and that, therefore, the comity and courtesy due from this country to Turkey did not, in the absence of appropriate sug-

gestion from the state department of this Government, require the extension of such immunity. As for my reasons for so holding I do not care to augment what I have previously said upon the subject in my memorandum of January 3, 1921. 127

Decree for libelant signed.

January 7, 1922.

JNO. C. KNOX
U. S. D. J.

Final Decree. 128

At a Stated Term of the United States District Court held in and for the Southern District of New York, at the Court Rooms thereof, in the Post Office Building, Borough of Manhattan, City of New York, on the 19th day of April, 1922.

Present: Honorable JOHN C. KNOX, District Judge.

CAMPBELL & STUART, INC., Libellant, 129

against

STEAMSHIP "GUL DJEMAL", her engines, boilers, etc.

A verified libel having been filed herein on the 15th day of Dec. 1920, claiming damages in the sum of Three Hun-

dred Seventy-five and 50/100 ($375.50) Dollars, with interest thereon from November 1, 1920, for supplies, labor and materials furnished to the S. S. *Gul Djemal,* and the claimant of said Steamship having, on or about November 18, 1921, filed its answer to said libel, admitting that said sum is due libellant, but denying that the said Steamship is within the Admiralty and Maritime jurisdiction of this Court and alleging that the said Steamship is immune from its process, and the respective parties having at the same time stipulated the facts of the case, and the action having duly come on for trial on the pleadings, proofs and stipulations of the respective parties, and after hearing the respective advocates, and due deliberation having been had, and the Court having rendered its decision that the steamship *Gul Djemal* is not, and at the times mentioned in the libel was not immune from seizure under process of this Court, and having rendered its decision, at the end of the trial, in favor of the libellant and against the steamship *Gul Djemal,* its claimants and stipulators, with costs, it is Now, on motion of Barker, Donahue, Anderson & Wylie, proctors for the libellant,

ORDER, ADJUDGED AND DECREED that the libellant herein recover of and from the steamship *Gul Djemal,* her claimants and stipulators, the amount of its damages arising out of the matters set forth in the libel herein, amounting to the sum of Three Hundred Seventy-five and 50/100 ($375.50) Dollars with interest thereon from November 1, 1920 to the date of the entry of this decree, amounting to the sum of $33.00 together with costs as taxed in the sum of $38.30 amounting in all to the sum of $446.80, with interest upon said sum from the date of the entry of this de-

cree until paid, and that the said vessel be condemned and 133
sold therefor.

JNO. C. KNOX,
U. S. D. J.

We hereby waive notice of the entry of the foregoing Decree.
Dated, New York, April 18th, 1922.

PURRINGTON & MCCONNELL,
Proctors for Claimant.

134

Petition for Appeal and Allowance.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CAMPBELL & STUART, INC.,
Libellant,

against

S.S. "GUL DJEMAL", her engines, boilers, etc. 135

Hussein Lutfi Bey, as Master of the S.S. *Gul Djemal,* owned, manned, operated by and in the possession of the Turkish or Ottoman Government, appearing herein for the interests of the Turkish or Ottoman Government, said owner of the S.S. *Gul Djemal,* and

specially for the purpose of claiming immunity and for no other purpose, conceiving himself aggrieved by the final decree made and entered on the 19th day of April, 1922, in the above entitled cause, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, this 22nd day of June, 1922.

PURRINGTON & MCCONNELL,
Proctors for Claimant,
Office & Post Office Address,
No. 52 Wall Street,
New York City.

The foregoing claim of appeal is allowed.

Dated, June 23, 1922.

JNO. C. KNOX,
Judge of the United States District Court for the Southern District of New York.

139

Assignment of Errors.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CAMPBELL & STUART, INC.,
Libellant,

against

S.S. "GUL DJEMAL", her engines, boilers, etc.

140

The claimant, Hussein Lutfi Bey, appearing for the purpose of claiming immunity and for no other purpose, hereby assigns error in the findings, decision and decree of the District Court herein as follows:

FIRST: In that the Court failed to hold as a matter of law that the steamship *Gul Djemal*, a vessel owned, manned, operated by and in possession of the Turkish or Ottoman Government, a foreign sovereign government at peace with the Government of the United States of America, was not subject to the Admiralty and Maritime jurisdiction of the United States District Court.

141

SECOND: In that the Court held that said steamship *Gul Djemal* was not immune from its process of arrest.

142 THIRD: In that the Court rendered a decree for the libellant.

FOURTH: In that the Court failed to dismiss the libel.

PURRINGTON & MCCONNELL,
Proctors for Claimant,
Office & Post Office Address,
No. 52 Wall Street,
New York City.

---

143 **Certificate of Knox, D.J., Pursuant to Sec. 238 of the Judicial Code.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CAMPBELL & STUART, INC.,
Libellant,

against

144

S.S. "GUL DJEMAL", her engines, boilers, etc.

In this cause, I hereby certify that the sole question raised by the answer of the claimant herein, and the sole issue before this Court, was the jurisdiction of the Court over the steamship *Gul Djemal*, a vessel owned, manned, operated by and in the possession of

the sovereign government of Turkey, at peace with 145
the Government of the United States of America. The allegations of the libellant that it had furnished supplies to the vessel, were admitted by the claimant, whose answer set up that the vessel was immune, as a sovereign owned vessel, from the process of this Court, and that the vessel was not within the Admiralty and Martime jurisdiction of this Court. I have granted a decree for the amount prayed for by the libellant, and have denied immunity to the vessel because at the time the cause of action and liability on which the libel is founded were created, and at the time the vessel was seized under 146
process of this Court, she was, although owned, manned, by and in the possession of the sovereign government of Turkey, engaged in commercial trade, under charter for hire to a private trader; and furthermore, because diplomatic relations between the United States and Turkey were then severed and no appropriate suggestion was filed from the State Department of the United States.

This certificate is made conformably to Judicial Code, Section 238, and my opinion filed herein is made a part of the record, and will be certified and sent up as a part 147
of the proceedings, together with this certificate.

This 23rd day of June, A. D. 1922.

Jno. C. Knox,
Judge of the District Court of the
Southern District of New York.

148

Stipulation As to Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CAMPBELL & STUART, INC.,
Libellant,

vs.

149 STEAMSHIP "GUL DJEMAL, her engines, boilers, etc.

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, July 20, 1922.

BARKER, DONAHUE, WYLIE & ANDERSON,
Proctors for Libellant.

150 PURRINGTON & McCONNELL,
Proctors for Claimant.

151

Clerk's Certificate.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

CAMPBELL & STUART, INC.,
Libellant,

vs.

STEAMSHIP "GUL DJEMAL, her engines, boilers, etc.

152

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this twentieth day 153
of July, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty~~-first~~ Fourth.

ALEX. GILCHRIST, JR.,
Clerk.

Endorsed on cover: File No. 29,042. S. New York D. C. U. S. Term No. 492. Steamship "Gul Djemal," her engines, boilers, etc.; Hussein Lutfi Bey, master, appellant, vs. Campbell & Stuart, Inc. Appeal from the district court U. S. for the southern district of New York. Filed July 21. 1922. File No. 29,042.

(8931)

DEC 31 1923

Supreme Court of the United States.

OCTOBER TERM, 1923—No. 83.

CAMPBELL & STUART, INC.,
Libellant-Appellee,

—against—

The Steamship "GUL DJEMAL," her engines, boilers, etc., Hussein Lutfi Bey, Master,
Claimant-Appellant.

BRIEF FOR THE APPELLEE.

BARKER, DONAHUE, ANDERSON & WYLIE,
Proctors for Appellee.

OSCAR R. HOUSTON, ESQ.,
EZRA G. BENEDICT FOX, ESQ.,
Counsel.

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Supreme Court of the United States.

OCTOBER TERM—1923—No. 83.

CAMPBELL & STUART, INC.,
Libellant-Appellee,

—against—

The Steamship "GUL DJEMAL", her engines, boilers, etc.,
Hussein Lutfi Bey, Master,
Claimant-Appellant.

BRIEF FOR THE APPELLEE.

Statement.

This case comes to this Court by direct appeal from the United States District Court for the Southern District of New York on a certificate of a question of jurisdiction, granted under Section 238 of the Judicial Code by the Honorable John C. Knox, United States District Judge for the Southern District of New York (fols. 143-147).

Facts.

The appellee filed a libel *in rem* against the S. S. *Gul Djemal* to recover for supplies and services rendered to the ship, at the request of her master, in the port of New York, during the month of November, 1920, which were necessary to render her fit and seaworthy for her intended voyage across the Atlantic (fols. 5-18).

The libel was filed on December 15, 1920, and the United States Marshal, pursuant to a monition issued by the United States District Court for the Southern District of New York according to the regular admiralty practice, attached the steamship *Gul Djemal,* her engines, etc., and duly filed his return (fols. 19-26).

Thereafter "Hussein Lutfi Bey, as master of the steamship *Gul Djemal,* by his proctors, Purrington & McConnell appearing specially for the purpose of objecting to the jurisdiction of the Court and to the arrest of the steamship *Gul Djemal,* and for no other purposes" (fol. 30), filed a "Special Claim and Exception to the Writ and Special Plea in Abatement" (fols. 37-48), wherein he alleged ownership and possession of the vessel by the Turkish Government and prayed for her release on the ground of sovereign immunity.

Counsel for the appellant at the same time moved and obtained an order (fols. 28-35) waiving the filing of any stipulation or security for costs and granting other minor relief. It is important to note the wording of the preamble of this order which reads:

> "It appearing to the Court that Hussein Lutfi Bey, as master of the steamship *Gul Djemal* * * * *has* filed a special claim to said steamship and a special plea in abatement for the purposes of claiming the immunity of the said steamship from arrest * * * and *has* filed exceptions to the libel on the ground that the steamship *Gul Djemal* is immune * * *" (fols. 30-31). (Italics are ours.)

It will be seen that this order is not a decision on the propriety of the claim or the competency of the master to make the same, but its only effect is to waive the usual stipulation for costs and to grant certain other minor relief.

Exceptions to the special claim (fols. 49-53) were duly filed by the libellant; and a motion was made by the claimant for the release of the steamship from arrest (fols. 55-60). This motion was denied by the District Judge (fols. 61-66).

A stipulation for value (fols. 67-81), a claim of Hussein Lutfi Bey as master (fols. 85-91), and the claimant's answer claiming sovereign immunity (fols. 92-101) were then filed, and the following stipulation of facts was also agreed upon by both parties and filed:

> "First: That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was owned by the Turkish or Ottoman Government, that it flies the Turkish flag; that Turkey has but one flag, for both national and commercial uses; that it is registered in the name of Seire-Seffain Administration; that the *Gul Djemal* is the absolute property of the Ottoman Seire-Seffain Administration, the third division of the Ministry of Marine of the Turkish Government, which is attached to the Ministry of War; that the maritime title has been given to the Administration Seire-Seffain by the Ministry of War. Said Seire-Seffain Administration, at the times above mentioned, was (and is) the Transport Section of the Ministry of Marine, and was (and is) charged with the control of transport vessels of the Turkish Government, and said vessels (of which the *Gul Djemal* was one), which are capable of commercial uses, are, when not used as transports, used in commerce; whether such vessels are used as transports or in commerce is subject to the direction of the Ministry of Marine, which through departments other than the Seire-Seffain has charge of battleships, artillery, torpedoes, wireless, and engineering work pertaining to all the vessels of the Turkish Navy; that the *Gul Djemal*

was transferred for operation to the Administration Seire-Seffain from the Ministry of War in 1914 and has since been under the control of Administration of Seire-Seffain.

Said Seire-Seffain Administration, at the times above mentioned, had (and has), as its head, a military officer of the Turkish Government, in the active or reserve service of the Turkish Government, and said head must be, at all times, a military officer in the employ of the Turkish Government, the Seire-Seffain Administration being charged with the transport of troops, and at all the times above mentioned, said head of the Seire-Seffain Administration was a Colonel; although said head of the Seire-Seffain Administration, at the times above mentioned, was in respect of the *Gul Djemal*, not functioning in a military or naval capacity.

Second: That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was in the possession of the Turkish Government, being manned by a master, officers and crew employed by or under the direction of said Seire-Seffain Administration, and paid by the Treasury Department of the Turkish Government through the Administration Seire-Seffain; said master, at the times above mentioned, was (and is) a reserve officer in the Turkish Navy employed by the branch of the Ministry of Marine known as the Administration Seire-Seffain, and the navigating officer was a Lieutenant in the active service of the Turkish Navy, both detailed by the said Ministry of Marine to serve on the *Gul Djemal* during the times above mentioned, but in such service they were not performing any naval or military functions, although they were subject to any orders from the department of the Turkish Government charged with naval or military affairs; the other officers and entire crew of the *Gul Djemal*, during the times above mentioned, were civilians, paid by the Turkish Government.

Third: That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was engaged in commercial trade, under charter for one round voyage to George Dedeoglou, who engaged to carry passengers and goods for hire, and in such trade the *Gul Djemal* was not functioning in a naval or military capacity, nor was there anything of a naval or military character connected with the voyage of the *Gul Djemal* from Constantinople to New York and return.

Fourth: That the Turkish Government, prior to the time mentioned in the libel herein, had severed diplomatic relations with the United States of America, advising its peoples by proclamation, however, that American institutions should not be molested but should be treated as heretofore; that said diplomatic relations have not been resumed; although the United States of America maintains unofficial relations with the Turkish Government by American Consular representatives, and through the medium of a High Commissioner; that during said period of the severed relations, the Spanish Ambassador to the United States has represented, and still represents, Turkish interests in the United States, and has been recognized as such representative by the Department of State of the United States of America.

Fifth: That the Turkish or Ottoman Government, and the Government of the United States of America, are sovereign governments, and were at all the times mentioned herein, at peace with each other although the Turkish or Ottoman Government was and is an ally of the enemy of the United States in the World War" (fols. 101-114).

No claim of immunity was ever presented, either in the Court below or in this Court in this proceeding, by any one other than the master of the ship. No special

authority on the part of the master to act for his sovereign was alleged or proved.

The cause then came on for trial and Judge Knox held that the *Gul Djemal* was not immune from seizure under admiralty process and signed a decree for the libellant (fols. 128-134). His opinion appears at folios 115-127. A final decree was thereafter duly filed (fols. 128-134), awarding a recovery to the appellee against the ship.

From this decree the claimant has appealed directly to this Court, contesting the jurisdiction of the United States District Court sitting in Admiralty on the ground that the steamship *Gul Djemal* was immune from arrest under process from our Courts.

Introduction.

The question of the sovereign immunity of foreign government-owned vessels has been dealt with by the Federal Courts in a long line of cases extending from *Moitez* v. *The South Carolina*—Bee 422—F. C. No. 9697 (decided in 1781) to the present day. The tendency of the recent decisions is towards withholding immunity—*The Pesaro*, 277 Fed. 473. (An interesting and able opinion by Mack, *C. J.*, which was quoted by Judge Knox in deciding the instant case (fols. 121-123).

It might here be remarked that the cases that show a tendency to favor immunity were all decided during the war, and the opinions show that the courts were largely influenced by a desire not to delay ships that were needed to meet the pressing requirements of transportation at that time. This is true, for example, of *The Maipo*, 252 Fed. 627, decided in 1918, apparently greatly relied upon by counsel for the appellant. It is clear that such considerations of public policy no longer apply.

In spite of numerous decisions, the question whether a ship owned by a foreign government, which it uses and operates as a merchant vessel, is immune from process, "is as yet an open question." *The Pesaro*, 255 U. S. 216, 218. Its "proper solution is not plain, but debatable * * * the question is an open one and of uncertain solution." *In re Hussein Lutfi Bey*, 256 U. S. 616.

The leading case in this country on the immunity of a government-owned vessel from arrest is *The Exchange*, 7 Cranch, 116, where a public armed ship-of-war, owned, manned and controlled by a foreign government at peace with the United States, constituting a part of the military force of her nation and employed exclusively in national objects, was held exempt. "And the decision can hardly be thought to go farther." *The Florence H*, 248 Fed. 1012, 1014. As this Court itself, in *Ex Parte Muir*, 254 U. S. 522, 531, remarked, "to apply the principle or doctrine of that decision" to a government vessel engaged in ordinary trade "would be taking a long step." Also see *U. S.* v. *Wilder*, 3 Sumner, 308; F. C. No. 16694.

Moreover, at the time of the seizure of the vessel, diplomatic relations had been severed between the United States and the Turkish Government (fol. 111) and it would seem that the Turkish Government was not in a position to claim the privilege of immunity because such a claim depends upon comity and "presupposes friendship." *Russian Soviet Republic* v. *Cibrario*, 235 N. Y. 255, at page 258.

But under the peculiar circumstances of the case at bar, the interesting and important issue as to the immunity of a merchant vessel owned by a government that had severed diplomatic relations with the United States, is not squarely presented, inasmuch as the immunity (if any exists) has not been claimed by any

one entitled to vindicate the prerogatives of Turkish sovereignty.

In the present case this defect is so clear that the appellee will not burden the Court with argument on any other point.

ARGUMENT.

The plea of sovereign immunity was improperly presented, as the master is not competent to claim his sovereign's immunity.

In *Ex Parte Muir*, 254 U. S. 522, this Court indicated the three ways in which the plea of sovereign immunity should be presented, as follows (p. 532):

> "As of right the British Government was entitled to appear in the suit to propound its claim to the vessel and to raise the jurisdictional question. *The Sapphire*, 11 Wall. 164, 167; *The Santissima Trinidad*, 7 Wheat. 283, 353; *Columbia* v. *Cauca Co.*, 190 U. S. 524, or, with its sanction, its accredited and recognized representative might have appeared and have taken the same steps in its interest. *The Anne*, 3 Wheat. 435, 445-446. And, if there was objection to appearing as a suitor in a foreign court, it was open to that government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this government, it might be set forth and supported in an appropriate suggestion to the Court by the Attorney-General, or some law officer acting under his direction. *The Cassius*, 2 Dall, 365; *The Exchange*, 7 Cranch, 116; s. c. 16 Fed. Case No. 8786; *The Pizarro*, 19 Fed. Cas. No. 11,199; *The Constitution*, L. R. 4 P. D. 39; *The Parlement Belge*, L. R. 4 P. D. 129; s. c. L. R. 5 P. D. 197."

These three rules are recognized on page 13 of appellant's brief as stating the law on the point; and it is there sought to bring the case at bar within the second of the above rules, viz:

> "Or, with its sanction *its accredited and recognized representative* might have appeared and taken the same steps in its interest. *The Anne*, 3 Wheat, 435, 445-446." (Italics are ours.) *Ex Parte Muir*, 254 U. S. 522, 532.

Therefore, we shall discuss this rule only.

The Anne, 3 Wheat, 435, 4 L. Ed. 428.

The Anne, a British merchantman, was captured near San Domingo, by an American privateer during the war of 1812. In the Prize Court, the Spanish Consul appeared and claimed the restitution of the property on the ground that the capture occurred within the territorial waters of San Domingo, a Spanish possession, and, therefore, constituted a violation of the neutrality of Spain. Mr. Justice Story, writing the opinion of the Court affirming the decree of condemnation, said (p. 445) that the second question in the case was:

> "Whether it was competent for the Spanish consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign? We are of opinion, that his office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. *He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted*, by virtue of his office, *with authority* to represent him in his negotiations with foreign states, or *to vindicate his*

> *prerogatives. There is no doubt, that his sovereign may specially entrust him with such authority; but in such case, his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it. There is no suggestion or proof of any such delegation of special authority in this case; and therefore, we consider this claim as asserted by an incompetent person,* and on that ground, it ought to be dismissed." (Italics are ours.)

In connection with the statement on page 13 of appellant's brief that "the sovereign owning the *Gul Djemal* had no formal diplomatic representative here," it is of interest to note that in *The Anne, supra*, "at the time on account of the unsettled state of the government in Spain no minister from that country was received by our government, but the former consuls were continued in the exercise of their functions by its permission" (3 Wheat, 435, 437). In the present case, it is undisputed that the diplomatic interests of the Turkish or Ottoman Government were being taken care of by the Spanish Ambassador (fol. 112). No reason appears why he could not have set up the claim of immunity, as he did, in fact, in another proceeding with respect to this ship, *Ex Parte Hussein Lutfi Bey*, 256 U. S. 616, which is more fully discussed hereafter.

It is submitted that the master of a vessel engaged in trade possesses no greater legal competency than a Consul to interpose a claim for restitution of property on the ground of the asserted violated rights of his sovereign "or to vindicate his prerogatives." Admitting that "Every master has a general agency for the owners," as is stated on page 14 of appellant's brief, still, it is submitted that the master of a *merchant* ship owned by his sovereign can only represent his sovereign for *commercial* purposes, and his functions are thus quite like a Consul's.

The following language of Mr. Justice Story in *The Anne, supra*, with respect to the authority of a Consul, it is submitted, is equally applicable to the master. He cannot be "considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority * * * to vindicate his prerogatives. There is no doubt, that his sovereign may specially entrust him with such authority; but in such case, his diplomatic character is superadded to his ordinary power, and ought to be recognized by the government within those dominions he assumes to exercise it. There is no suggestion or proof of any such delegation of special authority in this case" (3 Wheat 435, 445). Therefore, this Court, as in *The Anne*, should "consider this claim as asserted by an incompetent person, and on that ground, it ought to be dismissed."

In *The Sao Vicente*, 260 U. S. 151, 43 Sup. Ct. 15, this Court, in dismissing writs of certiorari brought by the Portuguese Consul General of New York in five cases involving the question of sovereign immunity, adopted and reaffirmed the rule laid down in *The Anne, supra*, quoted the passage from Mr. Justice Story's opinion set forth above in this brief, and cited in addition, *U. S.* v. *Wong Kim Ark*, 169 U. S. 649, 678; *In Re Baiz*, 135 U. S. 403, 424; *Ex Parte Muir*, 254 U. S. 522, 532; *The Pesaro*, 255 U. S. 216, 218.

In an attempt to bring the master of the *Gul Djemal* within the second rule laid down by this Court in *Ex Parte Muir*, 254 U. S. 522, 532, as an "accredited and recognized representative" of his sovereign, counsel for the appellant cite the case of *The Santissima Trinidad*, 7 Wheat. 283.

The statement of this case in the appellant's brief is inaccurate in several important particulars, and we, therefore, restate the case.

The *Independencia del Sud* was originally an American ship known as the *Mammoth*, but was sent to Buenos Aires and there sold by her owners to the United Provinces of the Rio de la Plata (a recognized belligerent), commissioned by that government as a public vessel of war, and sent out to prey upon the commerce of Spain. She proceeded to cruise off the Spanish Coast and then called at Baltimore, made some repairs and recruited some men, and her master also purchased and outfitted a smaller ship and both ships sailed to prey upon Spanish commerce. Thereafter they captured several Spanish ships, including the *Santissima Trinidad* and *St. Andre.* Later the *Independencia* entered Norfolk, having on board some cargo which had been taken by her from these two prizes.

The Spanish Consul, acting, not on behalf of his government, but on behalf of the Spanish owners of this cargo, filed a libel against this *cargo* claiming restitition on the ground that the *Independencia*, prior to the capture of the cargo in question, had violated the neutrality of the United States by augmenting her force during her call at Baltimore.

The master of the *Independencia del Sud*, Chaytor by name, opposed the libel. This Court first considered whether the *Independencia* was a public ship of war (p. 334) and it was in this connection that the Court used the language quoted in the appellant's brief, page 14. The *full* quotation on the point is as follows:

> "No bill of sale of the vessel to the government of Buenos Ayres is produced, and a question has been made, principally from this defect in the evidence, whether her character as a public ship is established. It is not understood, that any doubt is expressed as to the genuineness of Captain Chaytor's commission, nor as to the competency of the other proofs in the cause, intro-

duced to corroborate it. The only point is, whether, supposing them true, they afford satisfactory evidence of her public character. We are of opinion, that they do. In general, the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character; a bill of sale is not necessary to be produced. Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them, in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission, therefore, of a public ship, when duly authenticated, so far, at least, as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in public convenience and policy, and cannot be broken in upon, without endangering the peace and repose, as well of neutral, as of belligerent sovereigns."

The issue considered therefore was one of *title* to the *Independencia*, which was material to determine the rightfulness of the capture. No question of immunity from process was involved because no process had been issued against the *Independencia;* the libel was against the captured cargo. Furthermore, the Court did, in fact, take jurisdiction of the case, found that there had been a violation of American neutrality and awarded restitution of the cargo. The Court pointed out this very distinction, saying (p. 354):

> "* * * whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she

> brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality; and if the goods are landed from the public ship, in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge, that if illegally captured, they shall be exempted from the ordinary operation of our laws."

No case is cited in the appellant's brief (and none has been found by us) that sustains the right of the master of a merchant ship to assert his sovereign's immunities from process. Without reviewing all the cases in which the question of immunity has been discussed, it is perhaps sufficient to refer to the recent decisions of this Court on the subject of immunity.

Ex Parte Muir, 254 U. S. 522.

A libel *in rem* for collision was filed against the British steamship *Gleneden*. The ship was concededly privately owned, but a suggestion was filed by *counsel for the British Embassy in Washington*, appearing as *amicus curiae*, setting out a claim for immunity on the ground that the vessel was in use as a British Admiralty transport and this was supported by an affidavit of the master affirming the truth of much that was alleged in the suggestion. The District Court refused to release the ship, and a petition for a writ of prohibition was filed by the master in this court. The Court denied the writ, on the ground that the question of jurisdiction was a doubtful one, and the granting of the writ was therefore discretionary and the Court exercised its discretion against granting the writ. On the question of practice,

the Court, after laying down the general principles above quoted, said (p. 533) of the practice actually followed:

> "But none of these courses was followed. The suggestion on behalf of the British Embassy was presented by private counsel appearing as *amici curiae*, and not through the usual official channels. This was a marked departure from what theretofore had been recognized as the correct practice (see cases last cited), and in our opinion the libellant's objection to it was well taken. The reasons underlying that practice are as applicable and cogent now as in the beginning, and are sufficiently indicated by observing that it makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightly due to it, and tends to promote harmony of action and uniformity of decision. See *United States* v. *Lee*, 106 U. S. 196, 209. Of course, the suggestion as made could not be given the consideration and weight claimed for it."

The Pesaro, 255 U. S. 216.

The Italian steamer *Pesaro* was libelled by various cargo claimants and thereupon a suggestion was filed by the *Italian Ambassador* setting out that the ship was owned and operated by the Italian Government and claiming immunity. The libellants filed a traverse to the suggestion, but the Court declined to try the issue, held that the suggestion was conclusive and released the vessel. The libellants then appealed directly to this Court on the question of jurisdiction. This Court reversed the District Court, saying (p. 218):

> "* * * Apart from that suggestion, there was nothing pointing to an absence of jurisdiction. On the contrary, what was said in the libel pointed plainly to its presence. The suggestion

> was made directly to the Court and not through any official channel of the United States. True, it was accompanied by a certificate of the Secretary of State stating that the Ambassador was the duly accredited diplomatic representative of Italy, but while that established his diplomatic status it gave no sanction to the suggestion. The terms and form of the suggestion show that the Ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion and invite the Court to give effect to it. He called it a 'suggestion' and we think it was nothing more. In these circumstances the libelants' objection that, to be entertained, the suggestion should come through official channels of the United States was well taken. *Ex parte Muir*, 254 U. S. 522. And see *United States* v. *Lee*, 106 U. S. 196, 209. With the suggestion eliminated, as it should have been, there obviously was no basis for holding that the ship was not subject to the Court's process. What the decree should have been if the matters affirmed in the suggestion had been brought to the Court's attention and established in an appropriate way we have no occasion to consider now. An opportunity so to present and establish them should be accorded when the case goes back, as it must. Decree reversed."

Subsequently, the issues framed by the suggestion and the traverse were tried in the District Court and the Court in a very full and interesting opinion held that the vessel was not entitled to immunity.

The Pesaro, 277 Fed. 473.

This decision is now on its way to this Court for review.

Ex parte Hussein Lutfi Bey, 256 U. S. 616.

The same ship here involved was libeled on the same voyage by various libellants who claimed for wharfage, fuel, supplies, etc. Her master (who is the appellant in the present case) appeared specially, set up the claim that the ship was owned by the Turkish or Ottoman Government, and applied for the release of the ship, which was denied by the lower Court. Thereupon the master made a motion in this Court for a writ of prohibition, and, with the motion, *the Spanish Ambassador filed a suggestion* in which he set out that the *Gul Djemal* was the property of the Turkish Government and claimed immunity for her. The annexes to the suggestion were letters passing between the Ambassador and the State Department of the United States and showed that he was instructed by his government to take charge of Turkish Governmental interests in the United States and had been recognized in that capacity by the State Department.

This Court denied the motion on the ground that the jurisdiction was doubtful and should not be decided on petition for prohibition, following *Ex parte Muir, supra.*

The Sao Vicente, 260 U. S. 151, 43 Sup. Ct. Rep. 15.

Five libels, some *in rem* and some *in personam,* were filed, and the Portuguese merchant ship *Sao Vicente* was seized by the Marshal. The Transportes Maritimos do Estado appeared generally in all the cases, as owner of the ship, and filed bonds, but in its answers, which were verified by the Portuguese Vice Consul, set out that it was a department of the Portuguese Government and that both it and the ship were entitled to immunity. The lower Court sustained exceptions to these pleas in the answers. Appeals to the Circuit Court of Appeals were dismissed on the ground that they involved only the question of jurisdiction, but the Court also discussed other aspects of the cases (281 Fed. 111, 115).

Writs of certiorari were applied for by the Portuguese Consul General. The writs were granted and the cases argued, but this Court dismissed the writs on the ground that they were improvidently awarded because the Consul General was not competent, "merely by virtue of his office" to appear here for his government and claim immunity from process in the manner attempted", quoting the passage from *The Anne*, quoted *supra*, and citing other cases.

The ground upon which a consular officer is held not authorized to assert his sovereign's prerogatives is that he is a *commercial* representative, not a *diplomatic* representative, unless specially so authorized and recognized by our Government. This is clearly pointed out in the following case, which is one of the cases cited in the *Sao Vicente*.

In re Baiz, 135 U. S. 403.

Baiz was the Consul General of Guatemala at New York. He had also been appointed diplomatic representative of those countries, but the Secretary of State of the United States had declined to recognize him as such because he was an American citizen. Thereupon Guatemala appointed another man as Minister to the United States, and he served as such. Later the Minister returned temporarily to Guatemala leaving Baiz "in charge of the business of the legation", with the express consent of the Secretary of State.

In this situation a suit for the publication of a libel was filed against Baiz in the United States District Court. He objected to the jurisdiction on the ground that he could only be sued in the Supreme Court because of his diplomatic standing. The District Court

declined to dismiss the suit, and Baiz filed a petition in this Court for a writ of prohibition, which was denied. This Court discussed at length the distinction between commercial and diplomatic officers and quoted and followed the passage from *The Anne* quoted *supra*.

CONCLUSION.

In the present case, the master seems to be the only person who considers that any sovereign prerogative of the Ottoman Government has been impugned. The State Department of the United States declined to act (Appellant's Brief, p. 5). The Spanish Ambassador, who acted at the time the petition for prohibition was filed, *Ex Parte Hussein Lutfi Bey*, 256 U. S. 616, has taken no part in the present case and does not appear in the present record. The Ottoman Government itself, so far as the record discloses, has taken no steps whatever either by application to the State Department of the United States, instructions to the present appellant, or otherwise. It is not apparent why, under these circumstances, a mere private individual, Master of a merchant ship, even though a Turkish naval officer, on the reserve list (as most European shipmasters are), should have any standing to exempt his ship from the ordinary process of the Admiralty Courts.

Respectfully submitted,

BARKER, DONAHUE, ANDERSON & WYLIE,
Proctors for Appellee.

OSCAR R. HOUSTON, ESQ.,
EZRA G. BENEDICT FOX, ESQ.,
Counsel.

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Supreme Court of the United States

October Term, 1923. No. 83.

CAMPBELL & STUART, INC.,

Appellee,

against

Steamship "GUL DJEMAL", her engines, boilers, etc.,
HUSSEIN LUTFI BEY, Master,

Appellant.

BRIEF FOR THE APPELLANT.

WILLIAM A. PURRINGTON,
JOHN M. WOOLSEY,
FRANK J. McCONNELL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

CAMPBELL & STUART, INC., Appellee, *against* Steamship "GUL DJEMAL", her engines, boilers, etc., HUSSEIN LUTFI BEY, Master, Appellant.	October Term 1923 No. 83

BRIEF FOR THE APPELLANT.

Statement.

Hussein Lutfi Bey, "as Master of the *S. S. Gul Djemal*, owned, manned, operated by and in the possession of the Turkish or Ottoman Government, appearing herein for the interests of the Turkish or Ottoman Government, owner of the *S. S. Gul Djemal* and specially for the purpose of claiming immunity and for no other purpose," (Record, pp. 45, 46; fols. 134, 137), appeals from a final decree of the United States District Court for the Southern District of New York, directed by Hon. John C. Knox, D.J., adjudging that libellant recover damages in the sum of $375.50 with interest and costs (Rec., p. 43; fols. 128, 133).

The certificate of the District Judge made under §238 of Judicial Code states (Record, p. 48; fols. 143-147):

> "The sole question raised by the answer of the claimant herein, and the sole issue before this Court, was the jurisdiction of the Court over the steamship *Gul Djemal*, a vessel owned, manned, operated by and in the possession of the sovereign government of Turkey, at peace with the Government of the United States of America."

I. *The Facts in This Case Were Stipulated* (pp. 34, 38; fols. 102, 114).

The vital facts as agreed are summarized briefly:

The *S. S. Gul Djemal* when arrested and at all times referred to in the libel was a naval transport "owned by the Turkish or Ottoman Government" in its possession and flying its one flag (Ib., fols. 104, 105). When not in use as a transport, she, like others, was used in trade by the Seire Seffain, the third Division of Marine in charge of the transport service, with which she was registered.

The head of that Division was always a military or naval officer and was at said times a colonel, who in respect of the *Gul Djemal* was not acting in a military or naval capacity (fol. 107). The *Gul Djemal* came to the port of New York in the control and custody of her master, a Turkish naval officer on the reserve list. The officer second in command was a naval officer on the active list. *All other officers* and the crew were civilians *paid from the Turkish Government's Treasury;* but during this voyage were "not performing any naval or military functions", although subject to any orders from the department of the Turkish Government charged with naval or military affairs (Ib. par. Second; fols. 108, 110).

At all said times the *Gul Djemal* was—

> "engaged in commercial trade under charter for one round voyage to George Dedeoglou, who engaged to

carry passengers and goods for hire; and in such trade she (the *Gul Djemal*) was not functioning in a naval or military capacity. There was nothing of a naval or military character connected with her voyage from Constantinople to New York and return" (Ib. par. Third; p. 37; fols. 110, 111).

Prior to said times the Turkish Government had severed diplomatic relations with the United States; nevertheless "advising her peoples by proclamation that American institutions should not be molested but should be treated as heretofore". Diplomatic relations have not been resumed; but unofficial relations have been maintained by the United States through American consular representatives and a High Commissioner; the Spanish Ambassador in the United States representing Turkish interests, and being recognized in that capacity by our State Department (Ib. par. Fourth; pp. 37, 38; fols. 111-113).

The two governments are sovereigns and were at all times at peace, although Turkey was "an ally of the enemy of the United States in the World War" (Ib. p. 38; fol. 113).

So far as the stipulation accords with current history and the position of the United States Department of State, its facts are those of which, "The Court is bound to take judicial notice and for information as to which it may consult the Department."

Underhill v. *Hernandez*, 168 U. S. 250; 253.

The learned district judge on the stipulated facts held that the vessel was not immune from process for two reasons:

1) When arrested the vessel was, although owned, manned by and in the possession of the sovereign government of Turkey, engaged in commercial trade, under charter for hire to a private trader.

2) Diplomatic relations between the United States and Turkey were then severed and no appropriate suggestion was filed from the State Department of the United States. (Certificate, *supra,* at fol. 146); or as differently phrased in the opinion (fol. 126) because owing to the severance of diplomatic relations, *"the comity and courtesy due from this country to Turkey did not, in the absence of appropriate suggestion from the State Department of this Government, require the extension of such immunity"* (fol. 126, our italics).

Appellant submits respectfully that these reasons are not sound and therefore that the decree should be reversed.

2. *Previous Steps in Cognate Case in this Court.*

Before we discuss the reasons for a reversal, the Court should be reminded of previous steps taken before it.

On December 16th, 1920, in the port of New York, the vessel was attached (Ib. p. 9; fol. 25). Two applications have been made to this Court on her behalf for writs of prohibition and mandamus and denied. Neither application was in this suit.

Re Hussein Lutfi Bey, 254 U. S. 619.
Re Hussein Lutfi Bey, 256 U. S. 616.

The first petition was denied without opinion.

The second was denied in an opinion by Mr. Justice Van Devanter, which recognized that the questions involved were "important and also new"; but, held that as they were debateable and the allowance of the writs of prohibition was discretionary, the application should be denied.

The records on both applications are fully set forth in the one filed on the second (256 U. S. 616). They show

the efforts made by the Spanish Ambassador, representing Turkish interests here, pursuant to his sovereign's cabled instructions, to aid the vessel, and the attitude of the State Department at that time.

On the former application, the Ambassador—in accord with the procedure as then understood by certain eminent counsel and some judges—suggested the transport's ownership directly to the Court and asked her release, accompanying the suggestion with the State Department's certificate that he was duly accredited by his sovereign (pp. 45, 47 of the record in 256 U. S. 616). Also in reply to his letter (Ib. p. 68) the Department recognized that he represented Turkish interests and that there had been no declaration of war between Turkey and the United States, but preferred to refrain at that time from discussing the status of treaties (Ib. pp. 70, 71; cf. Department's letter to appellant's counsel, Ib. p. 63).

The decision in *Ex Parte Muir*, 254 U. S. 522, appearing at that time indicated that direct suggestions to the Court by diplomatic officers were not "appropriate" procedures; and accordingly, on February 14th, 1921, the Spanish Ambassador suggested to the State Department that it suggest to the Attorney General that the latter ask the vessel's release (Ib. 105, 106). The Department replied saying, among other things:

> "The Department has made it a practice carefully to refrain from taking any action which might constitute an interference by the authorities of this government in private litigation, even though such litigation may in some way involve merchant vessels owned by a foreign government. I therefore regret to say that the Department, in the light of the information before it, does not feel that it is in a position to take the action which you suggest." (Ib., p. 107; fols. 321, 322).

Appellant submits that the *Gul Djemal* being, in her main and general function, not a "merchant vessel" but a naval transport, her seizure was scarcely a "private litigation". If so, *The Maipo, The Carlo Poma, The Pampa, The Parlement Belge* and other cases, *infra,* were also such litigations.

However that may be, the rule enunciated by the State Department being one of general policy, the Spanish Ambassador could scarcely repeat his request; and, in the absence of a diplomatic representative of its own, the Turkish Government had no other way of presenting to the Court the facts than by the master's special appearance to protest against the Court's assumption of jurisdiction.

As master in possession and control of the vessel, he represented the sovereign owner, and moreover, as admittedly an officer in the Turkish navy, he was duly accredited by his commission.

The Santissima Trinidad, 7 Wheat. 283.

3. *Appellant's Special Appearance to Deny Jurisdiction.*

On January 26th, 1921, the Court allowed appellant, as master of the ship,—

> "*appearing specially for the purpose of objecting to the jurisdiction of the Court and to the arrest of the steamship* GUL DJEMAL, *and for no other purpose* * * * on the ground that the steamship is immune because she is, and at the time of her arrest under process herein was, in the possession of and owned by the Turkish Government,"

to file a claim and exceptions, a special plea in abatement, without stipulation or security for costs; giving libellant seven days within which to challenge the truth of the alleged facts (present record, pp. 10, 11; fols. 30, 31, our italics.)

On January 26th, 1921, the appellant still appearing specially, filed the special claim, exception to the writ and plea in abatement (p. 13).

On February 10th, 1921, libellant, in turn, filed an exceptive allegation, *traversing no fact, but alleging only one ground of exception, that the Turkish Government before the libel's filing had severed diplomatic relations with the United States, which relations had not been renewed;* wherefore it alleged the vessel was not immune; and prayed dismissal of the special claim, the exception to the writ and plea in abatement (pp. 17, 18; our italics). On the next day special claimant's proctors noticed a motion for the ship's release (p. 19), which, on *February 19th, 1921,* the Court denied, sustaining libellant's exception (p. 21; fol. 65).

4. *The Stipulation for Value Reserved the Claim for Immunity.*

Thereafter, *on April 25th, 1921,* the appellant and the Indemnity Insurance Company of North America executed and with leave of Court filed a stipulation for value approved by libellant's proctors in which the claim of immunity was reserved (p. 23 seq.).

The stipulation recites the master's special appearance for the sole purpose of claiming immunity, and the Company's consent to meet the claim unless it is *finally decided that the ship is immune,* or *in case she is found not immune to file a "general claim for the defense of this suit."* It also contained this proviso,—

> "Provided nothing in this clause contained to be construed as preventing the special claimant from insisting upon the immunity of the said steamship *up to such time as the immunity question herein shall have been decided by this Court* (i. e. District Court) and/or by any Appellate Court and/or by the *Supreme Court by a final decree* (p. 24; fol. 72, our italics).

The *condition* of this bond or stipulation for value reads as follows:

> "Now, Therefore, the condition of this stipulation is such that (1) *if the steamship* GUL DJEMAL *is finally held to be immune from process of this Court by this Court and/or by any Appellate Court and/or by the Supreme Court of the United States,* (2) or if the special claimant herein and the Indemnity Insurance Company of North America, having an office and principal place of business at No. 22 William St., Borough of Manhattan, in the City of New York, the undersigned hereon, abide by all the orders of the Court, interlocutory or final, and pay the amount awarded by the final decree rendered by this Court, or by any Appellate Court, if an appeal intervene, with interest, then this stipulation to be void, otherwise to remain in full force and virtue." (Record, p. 25; fol. 73).

Thus not only is this stipulation for value on its face a denial of, and a protest against the assumption of jurisdiction owing to the foreign government's ownership and possession of the vessel, and also an agreement by the approval of libellants' proctors, that the security should be in all legal respects the ship itself but it renders recovery under it impossible unless the *Gul Djemal* is held not to be immune.

Constructively the vessel remained here in possession of the sovereign in whose behalf security was given by agreement in order to obtain from this Court a final decision of the new and important international questions involved while not waiving the vessel's immunity or keeping her tied up at great expense and loss.

5. *The Subsequent Proceedings prior to the Decision below.*

On November 19th, 1921, appellant, as master, filed, by one of his proctors, a special claim, again asserting

the Turkish Government's ownership and possession and praying,—

> "to defend accordingly, *without prejudice to the claim of immunity of the* GUL DJEMAL *from suit heretofore asserted by the Turkish Government, a foreign sovereign*" (Ib., p. 29; fols. 87, 88; our italics).

On the same day (Nov. 19th), pursuant to the agreement of the respective proctors, the master filed an answer (p. 31, seq.) claiming the vessel on behalf of her owner, admitting, for purposes of litigation, the rendition of services and their value, but once more denying that the ship was within the Court's jurisdiction; and making this, as certified by the Court, the sole issue (p. 32; fols. 95, 96; pars. Fifth and Sixth).

It is only when a defendant pleads to the merits in the first instance without insisting upon the illegality that the objection is deemed to be waived.

> *Harkness* v. *Hyde,* 98 U. S. 476;
> *Yanuszauckas* v. *Mallory S. S. Co.,* 232 Fed. 132.

Giving a bond to release property from illegal attachment does not waive a good objection to jurisdiction if it be renewed.

> *Cricket S. S. Co.* v. *Parry,* 263 Fed. 523, 525.

General appearance is a matter of intent which must be clear and unequivocal.

> *Dahlgren* v. *Pierce,* 263 Fed. 841, 846.

In a somewhat similar case—

> *The Oliver American Trading Co., Inc.* v. *The Government of the United States of Mexico* et al. (decided Oct. 11, 1893, Sou. D. of N. Y.)

it was said that the

> *"clear intendment when fairly construed, is that the appearance was special and designed to raise the questions of immunity presented by their motions"* (Mss. opinion, pp. 9, 10).

6. *Opinion of the District Court.*

On January 7th, 1892, Knox, D. J., rendered the opinion referred to *supra* (p. 39).

On April 19th, 1922, the final decree was entered (p. 43).

7. *The Appeal.*

On June 22nd, 1922, this appellant still *"appearing herein* (and being allowed so to appear) for the interests of the *Turkish Ottoman Government, said owner of the* S. S. GUL DJEMAL *and especially for the purpoes of claiming immunity and for no other purpose,"* filed the assignment of errors and prayed allowance of the appeal, which was granted (pp. 45, 46).

Finally, *on June 23rd, 1922,* the District Judge, pursuant to the Judicial Code, Section 238, filed the certificate above quoted (Ib., p. 48; fol. 144), and made it part of the record.

Thereupon the special claimant filed his assignment of errors.

8. *Assignment of Errors.*

Error is assigned as follows:

First: The Court's failure to hold as a matter of law that the said vessel owned, manned, operated by and in possession of said Turkish or Ottoman Government, a foreign sovereign government at peace with our own, was not subject to the Admiralty and Maritime jurisdiction of the United States District Court.

Second: The holding that the said steamship was not immune from process of arrest.

Third: The rendition of a decree for the libellant.

Fourth: The failure to dismiss the libel. (Record, page 47.)

9. *The Questions Arising in this Court upon the Foregoing Record are:*

First: Was the sole issue, that of the *Gul Djemal's* immunity from seizure as a vessel owned, possessed, operated and controlled by a foreign sovereign without that sovereign's consent, appropriately presented to the Court.

Second: Did the *Gul Djemal,* because she was chartered to a private person for a commercial voyage, forfeit the immunity granted by international comity to naval vessels in the ownership, possession, operation and control of their sovereigns and subject to their orders in public service.

Third: Did she forfeit that customary immunity because diplomatic relations were suspended between the United States and Turkey, without declaration of war and during a state of peace.

POINT I.

The issues were appropriately presented below. Every fact having been agreed upon and only a question of law being before the Court, a direct suggestion from the Department of State to the Court as to how that question should be decided was not requisite or customary and might not have been "appropriate".

The executive branch of the Government having been advised of the matter, objection on its part to establishment by the Court of the Gul Djemal's *right to immu-*

nity under rules of evidence and according to recognized principles of international law and comity will not be presumed.

The function of a suggestion by the State Department to the Attorney General that a sovereign's property has been seized, and by the Attorney General to the Court with a request that the property be released, is or was *ab origine* to place before the Court uncontradictable evidence of a foreign sovereign's ownership. Here that ownership and sovereignty were admitted and found by the Court. No certificate of executive officers was needed to say an undisputed thing in a still more solemn way.

There seems to have been general misapprehension, until recently, by both Bench and Bar, of the procedure in such cases. It has been said that the method of establishing the fact of national ownership before the Court was comparatively immaterial so long as it was established.

Long v. *Tampico,* 16 Fed. 491.
The Maipo, 252 Fed. 627 (and cases cited).

This is presumably still true. But if the proof in a given case is proffered, not by the judicial method of adducing testimony contradictable by the adverse party, but by executive suggestion after diplomatic negotiations, then the formalities must be strictly followed, viz: a suggestion by a diplomatic representative to the State Department, by the Department to the Attorney General and by him, or by proper law officer under his direction, to the Court, with a request for the vacating of process; for it seems that direct diplomatic "suggestions" and even executive "suggestions" without such a request are *vox et praeterera nihil,* suggestions and nothing more.

The Pesaro, 255 U. S. 216.
The Attualita, 238 Fed. at 911, Par. 4.

Lately this Court indicated—without saying that they excluded every other—three ways by which application may be made for the release of a sovereign's property from arrest made without his consent and for questioning the court's jurisdiction:

First, by the sovereign's appearance as a suitor.

Second, by the appearance, with his sanction, of his duly accredited and recognized representative as a suitor.

Third, by making his claim a matter of diplomatic negotiations.

> *In re Muir* (Master of the Gleneden), 254 U. S. 522.

The second method seems under the circumstances the only one applicable here. For sovereigns or their ambassadors who represent the sovereign's persons, to appear as suitors, would seem to imply that their testimony might be subject to contradiction, their veracity impugned. That might present an embarrassing political situation. So even might dispute of the veracity of lesser diplomats. The mere allegations of the British Embassy's counsel appearing as *amici curiae in re Muir* (*supra*), were held to be insufficient evidence.

In this case at Bar, however, the sovereign owning the *Gul Djemal* had no formal diplomatic representative here. But it did have in the appellant an officer of its navy and master of its ship a representative by law, and the custom of the sea, sufficiently accredited to enter its protest against seizure of its property.

The question arises:

Was this appellant authorized to make a special claim for or protest against violation of his sovereign's immunity?

Every master has a general agency for the owners. His special property in the ship, her cargo and freight, authorize him to bring in his own name actions which the owners and others may have in relation to the ship: by parity of reason he may defend the owners and his own rights.

Indeed, it is usually the master of a vessel who, as custodian for the owners, claims her when she is freed from arrest, and a bond is filed in her place. In many courts formal delivery is made by the marshal who has the vessel under arrest to the master when she is freed.

> *Benedict's Admiralty,* Sec. 313 (Ed. of 1910)
> *Disney* vs. *Furness,* 79 Fed. 810
> *Jacobsen* vs. *Dalles P. & A. Nav. Co.,* 93 Fed. 975

In *The Santissima Trinidad,* 7 Wheat. 283, *supra,* a Spanish Consul libelled that ship to recover property alleged to have been taken piratically by armed ships commanded by persons assuming to be citizens of the United Provinces of the Rio de la Plata, then a revolting Spanish colony, and brought as prize to Norfolk, Va., by the *Trinidad.* Her captain, James Clayton, claimed immunity for his ship as a public vessel. On this point the Court said, by Story, J.:

> "It is not understood that any doubt is expressed "as to the genuineness of Captain Clayton's com- "mission, or as to the competency of the other proofs "in the case introduced to controvert it. The only "point is whether, supposing them true, they afford "satisfactory evidence of her public character. We "are of opinion that they do. In general, the com- "mission of a public ship, signed by the authority "of the nation to which she belongs, is complete proof "of her public character * * * The commission, so "far at least as foreign courts are concerned, imports "absolute verity, and the title is not examinable" (at p. 335).

In that case there appear to have been no suggestions from executive departments, and here there is no dispute of Lutfi's commission.

From all these cases it would seem to follow in the instant case that since the captain and second officer of the *Gul Djemal* are concededly officers of the Turkish navy, and since the vessel itself is a naval transport, i. e., a war vessel, therefore the Master, being by his commission the accredited agent of the owner, his sovereign, has the same right as had Captain Clayton to prove the sovereign's claim of immunity without intervention of the executive officials of the United States.

The facts conceded by the stipulation are adequate, and being uncontroverted are *conclusive* evidence that Lutfi Bey was his sovereign's duly accredited representative or agent, at least within the usual province of a ship's master.

It was therefore error to hold the *Gul Djemal* subject to the Court's jurisdiction because of the absence of appropriate suggestion from the State Department.

The sovereign's consent to have his property seized cannot be implied. Indeed the previous record shows that Turkey did not consent.

The master being authorized to make the claim to possession of the ship, what better evidence can there be of a ship's status than the deliberate agreement of adverse parties as to the facts, when each is free, as here, to traverse or challenge his adversary's allegations.

Upon so important a question of whether a government exists, the New York Court of Appeals said recently:

> "Here, however, we need no proof. The fact is conceded."
>
> *Wulfsohn* v. *Russian Socialistic Federated Soviet Republic,* 234 N. Y. 372; 374.

so, also, in

Russian Republic v. *Cibrario*, 235 N. Y. 255.

the effect of nonrecognition of the plaintiff by our government being under consideration before the same Court it said (at p. 262):

> "The plaintiff concededly has not been so recognized. There is therefore no proper person before us."

In *re Muir, supra*, the concession that the *Gleneden* was not an armed ship of war and not owned by a private government but by a private corporation was accepted as evidence in this Court.

"So far as jurisdiction is concerned, there is no difference between suits against a sovereign directly and against its property;" as was said in *Hassard* v. *U. S. of Mexico, et al.*, 29 Misc. (N. Y.) 511; 512; afd. on opinion below 46 A. D. 623; afd. 173 N. Y. 645.

In that action attachment issued against defendants' property. The United States District Attorney, disclaiming any authority from defendants appeared as *amicus curiae*, instructed by the United States Attorney General and moved to vacate the process, upon the ground that the Court had no jurisdiction and that to assume it might involve political complications. The motion was granted, the Court citing:

> *Stanley* v. *Schwalby*, 147 U. S. 508; and
> *United States* v. *Lee*, 106 U. S. 196.
> Cf. *Russian Republic* v. *Cibrario*, 235 N. Y. 255, 261.

In *The Luigi*, 230 Fed. 493 a case wherein a ship requisitioned by the Italian Government was held not immune when her master had appeared and claimed her *for her owners, private individuals*, and had filed

a bond by them and so released her, it was said by the Court at page 496:

> "It is far more important for the courts of the United States to recognize the international rule of comity that an independent sovereign cannot be personally sued, because such a suit would be inconsistent with the independence and equality among the nations of the State which he represents, than it is to take cognizance of private rights if by so doing that rule is violated" (at p. 496).

The Court further said that if by the attachment its authority were indirectly exercised upon the Italian Government the writ should be quashed; but the private owners, by giving the bond, had converted the suit into one between private individuals, had alone become parties as obligors, and had done for the Italian Government all that would have been obtained by vacating the attachment.

In the case at bar, security has not been given by or for private owners, but in behalf of the Turkish Government by its officer and agent with explicit reservation of its right to assert immunity.

POINT II.

The Gul Djemal, a government naval transport owned, manned and controlled by a foreign sovereign at peace with the United States, did not lose her immunity from seizure because temporarily chartered for a trading voyage while still in the Turkish naval service and subject to orders.

She might have been called back by the Turkish Government to engage in transport service, her primary function, as even privately owned merchant ships were

requisitioned by the belligerents while on voyage: an example of such action in the case of a private vessel is found in the case of

The Adriatic, 253 Fed. 489; afd. 258 Fed. 902.

It is the settled American rule that a foreign war vessel of a nation with which we are at peace is exempt from execution of process.

The Exchange, 7 Cranch 116.

It is not held by that or by any other American or English ruling case that a public government vessel loses immunity because temporarily engaged in trade while still in governmental ownership, possession and control and subject to orders. In *The Pesaro,* 277 Fed. 473 (discussed *infra*) a contrary view is expressed. Other Federal, Circuit and District judges have held distinctly and with substantial unanimity that the sporadic use in trade of a foreign government's naval vessel, while still in public ownership, possession and operation, does not forfeit its immunity.

The Pampa, 245 Fed. 137.
The Maipo, 252 Fed. 627.
The Carlo Poma, 259 Fed. 369, 371.
The Maipo, 259 Fed. 368.
Moore & McCormack Co. v. *Hesslein (The Sargento Albuquerque),* 255 Fed. 46.

The English doctrine as stated in the ruling case of

The Parlement Belge, L. R. 5 P. D. 197.

and emphasized in

The Porto Alexandre L. R. (1920), p. 30,

is explicit, broader than the American rule in that it makes ownership alone the test of immunity, especially

interesting as adopting the reasoning of the American case of *Briggs* v. *Light-ships,* 93 Mass. (11 Allen) 157, and particularly in point as disapproving the theory ably advanced by Sir Robert Phillimore in

The Charkieh L. R. 4 A. & E. 59 (1873)

that a sovereign, by engaging in trade, forfeits his and his vessel's immunity.

In the last case, immunity from process was claimed for the *Charkieh* as a ship of the Egyptian navy under the Khedive's sovereignty. She ran as a packet between Alexandria and Constantinople, carrying cargo, mails and passengers. Going to England for repairs, she carried thither and advertised to carry back cargo. Sir Robert Phillimore held that the Khedive was not a sovereign, and, therefore, his vessel was not immune. His further proposition that even if the Khedive were a sovereign, the ship's immunity would be forfeited by its employment in trade, would seem to be *obiter dicta;* at all events it was disapproved in—

Mighell v. *Sultan of Johore* (1894 1 Q. B. 149-154)

and over-ruled by

The Parlement Belge (L. R. 5 P. D. 197)
Cf. *The Constitution* (L. R. 4 P. D. 39)

In the case last cited, a United States naval vessel carrying to New York American exhibits in the Paris Exhibition of 1867, was held by Sir Robert Phillimore immune from libel for salvage; (a claim subsequently paid by our government as a *moral* obligation—Davis; The Elements of International Law, new edition, pp. 81, 82).

Cf. *The Jassy,* 1906 Probate 270
Cf. *The Gagara,* 1919 Probate 95

The *Parlement Belge* has been recognized as the ruling English case, and its doctrine accepted in decisions of our Federal Circuit and District courts; subject to the addition of governmental possession, as a ground of immunity, to that of ownership (*The Maipo, The Pampa, The Carlo Poma,* et al, *supra*).

As said above, one American opinion, apparently accepting Sir Robert Phillimore's views, in *The Charkieh,* as to what the law should be is that of Mack, C.J., in

Luzzato & Son v. *S. S. Pesaro,* 277 Fed. 473
(D. C., S. D. N. Y., p. 41; fols. 121-123)

That case was followed by Knox, D.J., in deciding the instant case but the two are readily distinguishable. The *Pesaro* had been released by the District Court upon the Italian Ambassador's direct suggestion. This Court reversed that decree, on direct appeal, saying that, apart from the suggestion, nothing pointed to absence of jurisdiction, while the statements in the libel pointed to its presence. The Court said:

> "The terms and form of the suggestions show that the Ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion, and invite the Court to give effect to it. He called it a 'suggestion' and we think it nothing more."

So saying this Court sustained the assignment of error that the suggestion should have come through official channels of the United States and left the allegations of immunity to be established "in an appropriate way."

The Pesaro, 255 U. S. 216.

The merits of the case were then brought to trial, as in the instant case, upon stipulation which conceded that the vessel's master, officers and crew were civilians, "*not*

under the orders of or connected with the Italian naval or military forces'', not on the Italian naval roster, nor under the immediate direction of the Department of the Italian Government having to do with naval and military affairs, and that she was regularly engaged in trading. It was also consented that there might be read in evidence an Italian advocate's opinion that under the law of Italy the ship would not be immune from process of Italian courts.

The trial judge, being apparently of the opinion that the nature of the service in which a vessel is engaged *at the time of the cause of action's accrual, or of arrest,* is the test of immunity rather than the sovereign's possession and the vessel's general purpose,—held that the *Pesaro* was an ordinary merchant vessel and therefore not immune from arrest.

The Court said, 277 Fed. at 482:

> ''Especially as no exemption has been claimed for her, by reason of her sovereign or political character, through the official channels of the United States.''

and then, indicating doubt as to this ruling, added:—

> ''But if I err in believing that the accepted law of this country does not require a holding that merchant vessels owned and operated as such by a foreign sovereign state are, therefore, exempt from seizure, the *Pesaro* would nevertheless not be entitled to immunity''; (Ib., p. 482; par. 4), the reason for this conclusion being that ''the fact that the steamship *Pesaro* itself is subject to the ordinary processes of the Italian Court would seem to be *vital and decisive.* There is no reason of international comity or courtesy which requires that Italian property not deemed *extra commercium* in Italy, should be treated as *res publica* and *extra commercium* in the United States'' (Ib., p. 483; par. 1).

Such being the ''vital and decisive'' fact upon which *The Pesaro* on its latest voyage through the courts was

decided, the other propositions as to which the learned judge thought error possible, may fairly be regarded as *obiter dicta.* There is no suggestion in the case at Bar to the effect that Turkish Courts would not grant immunity to American Government vessels.

The Pampa, an Argentine naval transport commanded by naval officers with a crew of enlisted men, brought to the port of New York under commercial charter a general cargo and was libelled for collision. After arrival she received orders to carry back artillery and munitions of war. The Argentine *chargé d' affaires ad interim* personally appeared in court to suggest the vessel's immunity. The Court ordered her release, quoting with approval from the opinion in *"The Attualita"* (238 Fed. 909, 911), this excerpt:—

> "For actions of the public armed ships of a sovereign, and of those, *whether armed or not, which are in the actual possession, custody and control of the nation itself, and are operated by it,* the nation would be morally responsible, *although without her consent not answerable legally in her own or other courts"* (our italics).
>
> *The Pampa,* 245 Fed. 137.

In

> *Moore & McCormack* v. *Hesslein* involving *The Sargento Alberqueeque,* 255 Fed. 46

it appeared that libellants, agents of a South American line, contracted to carry merchandise on a specified boat, which failed to appear in time to load. Libellants tendered in her place the steamship *Sargento Alberqueeque,* a Brazilian naval transport, which respondents declined to accept. The Circuit Court of Appeals, reversing the District Court, held that this was not a proper tender, and said at page 48:

> "She was a transport of the Brazilian navy commanded by a lieutenant of that navy. The shipment if made would have been in the possession of the Brazilian Government, and if it had been damaged or lost the respondents could not have proceeded against the Brazilian Government, it being a sovereign, *in personam*, nor against the steamer *in rem*."

It is not our purpose to expand the brief unduly by long excerpts from decided cases; nor to discuss at length cases like *The Attualita, The Adriatic, supra,* and others wherein a government's immunity has been claimed for privately owned ships like the *Gleneden* under requisition; for the *Gul Djemal* was not under requisition by but concededly owned and possessed by the Turkish Government. We may, however, note in passing,—

The Roseric, 254 Fed. 154.

There, after reviewing the cases, the Court approved the opinion of Judge Gray, later a Justice of this Court, in

Briggs v. *Light Boats,* 93 Mass. (11 Allen) 157-163.

that immunity existed not for war vessels only but for those that are (italics ours) "instruments of sovereignty and *does not depend on the extent or manner of their actual use at any particular moment but on the purpose to which they are devoted.*"

This, as already said, was the view approved and adopted in *The Parlement Belge, supra.*

The *Gul Djemal's* purpose was to serve as a transport in the Turkish navy. When arrested, she was still in that Government's ownership and control. *Although temporarily under a commercial charter, the purpose to which she was devoted was that of a naval transport.* To that service she could have been called at any time.

It is submitted that the substantially unanimous judicial opinion up to the present time is well expounded in

> *The Maipo,* 252 Fed. 627, *supra,* Cf. 259 Fed. 369.

That vessel was libelled for damages to hides brought by her from Montevideo to New York under a commercial bill of lading of the usual character. The Chilean *chargé d'affaires* through proctors "appearing specially for the Chilean naval transport *Maipo*," suggested directly to the District Court that the vessel—

> "was and now is owned by the government of the republic of Chile, being a transport in its navy and in the possession of the Government of Chile in the person of a duly commissioned officer of the navy, the master of said steamship, and wholly manned and operated by a crew employed and paid by said government."

So far the facts are substantially those in the instant case.

An additional statement that she was "to carry back to Chile a cargo belonging to the Chilean Government," was disregarded by the Court under an agreement between proctors (Ib. p. 628). The suggestion was accompanied by a certificate of the Secretary of State that the *chargé d'affaires* was duly accredited; but, so far as appears, it did not state that the vessel was the property of Chile or ask for its release. Judge Mayer said:

> "I shall assume because of the facts *infra,* that while the Chilean Government is not directly trading, it is in effect using or permitting the vessel to be used for commercial purposes" (p. 628).

(No more can be assumed against the *Gul Djemal*). • • • Judge Mayer said further:

> "Even though the vessel was chartered by a private person for hire, and that private person contracted for freight for his personal profit" (the *Gul Djemal's* case) "it might be argued with much force, that nevertheless the vessel was used for a governmental purpose, in so far as it enabled Chilean shippers to export their products to the United States and to bring back from her to Chile, commodities needed by the people there" (Ib. p. 629).

Finding *The Parlement Belge* (*supra*) to be the ruling English authority, the opinion concludes that under our law when ownership and possession are both present, as they are in the instant case, the *res* is immune. *The Davis*, 10 Wall 15, was cited.

Later, in another libel of the same ship,

The Maipo, 259 Fed. 367,

Hough, C. J., agreeing with Judge Mayer's ruling, said:

> "Why was a war vessel exempt from seizure? Not because it was a war vessel, but because it was a part of the exercise of or manifestation of sovereign power. Why is any other vessel exempt? For the same reason, just as the sovereign himself is exempt" (pp. 367, 368).

In *The Carlo Poma*, 259 Fed. 369, 371, *supra*, the Second Circuit Court approved the conclusions in the *Pampa* and *Maipo* cases.

It is true that the decree on that appeal was vacated, but solely on the procedural point that the appeal lay directly to this Court.

The Carlo Poma, 255 U. S. 219.

None the less, the Circuit Court's opinion expresses the substantially unanimous view taken of the substantive

law by the Federal judges who have passed upon the question, in these words:

> "The appellant contends that a vessel of a foreign sovereign not being a war vessel or at the time performing public duties but engaged in carrying cargo commercially is not entitled to immunity from suit. The English Courts go the whole way in refusing process against property of a foreign sovereign under any circumstances. This because of the international comity due from one sovereign to another." *The Parlement Belge*, Law Reports 5 P. D. 197; *The Jassy* (1906), 270. "The law of the United States is the same, except that the immunity of property of a sovereign depends not merely upon the ownership but also upon the actual possession by the sovereign of the property at the time process is served" (at p. 376; citing *The Davis*, 10 Wall 15; *Long* v. *The Tampico*, 16 Fed. 491. *The Attualita*, 238 Fed. 909; 152 C. C. A. 43).

The *Carlo Poma* was libelled for damage to 10712 boxes of lemons. The Italian ambassador suggested directly to the Court that the vessel was owned by his Government, registered in the name of the Italian State railways, a branch of that Government, in the Government's possession in the person of a master paid by the Government and operated by a crew employed and paid by the Government for which it was to carry back a cargo. The suggestion was accompanied by the Secretary of State's certificate that the Ambassador was duly accredited. There was no allegation that the vessel was, like the *Gul Djemal*, a naval transport in command of naval officers.

Assume that in *The Maipo, The Pampa, The Carlo Poma,* and other like cases, there had been stipulations such as the one here; would not they have been appropriate presentations of the facts and would not and should not the courts have disclaimed jurisdiction, as in fact they did, without any request from the "official channels" of

the Government, a request, by the way, which does not appear in several of the cases.

There may be differences of opinion as to the desirability of allowing immunity to government owned and possessed ships engaged directly or under charter, in peaceful trade for revenue, the collection of which is a governmental function as beneficent, necessary and important as, and far less costly and harmful than making war in order to annex territory or to resent an affront. But there is not any doubt as to the fact that the weight of decision is in favor of immunity.

A sovereign may conduct a railroad for profit.

> Mason *vs.* Intercolonial Ry., 197 Mass. 349;
> Cf. Ballaine *vs.* Alaska Northern Ry. Co., 259 Fed. 183 (U. S. Intervener and cases cited).

On the same principle he may carry on a steamship line if he deems it wise and advantageous so to do.

The likelihood that governmental competition will ever seriously injure private traders because of the immunity here claimed is negligible. Shippers would not ship, nor would underwriters insure cargo on vessels immune from liability. The same is true regarding the furnishing of materials by material, supply and repair men. They would have a moral claim against the Government owners, which might be met as was that against "*The Constitution*" (supra).

Much more likely and practical would be the precautions taken by such persons to require cash payments or security from immune vessels. Be all these hypotheses as they may, they are merely arguments *ab inconvenienti*, and not justiciable. It is within the province of the legislative and executive branches of the government to anticipate and provide remedies for them. It is not with-

in the judicial province to depart from established principles of international law and comity in order to mollify hardships whether actual or suppositional.

That the remedy is not in the courts is clearly expounded by Lord Justice Scrutton in the salvage case of

The Porto Alexandre, L. R. (1920), p. 30.

Hill, J., sitting in the first instance, reluctantly, and disregarding his personal views, set aside the writ as to the ship and freight, because they were shown to be property of the Portuguese Government, but sustained it as to cargo. He said:

> "I have already in previous cases pointed out what I conceive to be very strong reasons why it is undesirable that cases should be withdrawn from the courts, but I have only to assert what I conceive to be the law" (p. 31).

On appeal, Bankes, L. J., said (p. 33):—

> "I gather from the judgment of Hill, J., and from what has been said by learned counsel, that this question (i. e. the immunity of a sovereign's vessels engaged in trade), is becoming one of growing importance. In the days when the early decisions were given, no doubt what were called Government vessels were confined almost entirely, if not exclusively, to vessels of war. But in modern times, sovereigns and sovereign states have taken to owning ships which may to a still greater extent be employed as ordinary trading vessels engaged in ordinary trading. This fact of itself indicates the growing importance of the particular question, if vessels so employed are free from arrest." (Cf. Hough's opinion, *supra,* in *The Maipo,* 259 Fed. 369).

Then noticing briefly some opinions in earlier cases, that the service in which the ship is engaged at the time should be the test of her immunity, (the view of Mack,

C. J. in *The Pesaro,* 277 Fed. supra), he accepted the law, as laid down in *The Parlement Belge.*

Without further citing authority, we are content to rest the construction of the English rule upon *The Parlement Belge* and *The Porto Alexandre,* emphasizing the fact that Warrington, L. J., concurring in the latter case, quoted *Brett, L. J.,* in the former as expressing and approving the result of the American case of *Briggs* v. *Light Boats* and founding his conclusion upon it. That opinion was rendered, as already said, by Judge Gray, later Mr. Justice Gray of this Court. Narrow the English rule by including in the tests of immunity, governmental possession as well as ownership (*The Davis, The Carlo Poma, The Pampa, The Attualita,* all *supra*) and we have the rule applicable to the stipulated facts in the instant case, viz:—

that at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal,* the *Gul Djemal* was owned (Record, fol. 10) and in the possession of the Turkish Government (R., 36; fol. 108).

The Executive Branch of the United States Government was aware of the *Gul Djemal's* arrest, a fact of which it might have taken cognizance, even if not specially advised of it. Seizure of a foreign government's vessel in time of peace is, at least, an unfriendly act; at most, a *casus belli.* In the absence of executive objection it is the function of the Courts to administer well established rules of international law and comity. It is the function of the Executive Branches, especially at critical moments, to see that peaceful relations shall not be disturbed. The Courts should no more assume executive objection to the release of a vessel than they should assume, without expression thereof or waiver, a sovereign's consent to be sued. If the executive may think it best not to ask the Courts to vacate process in such cases, it may abstain from active interference.

Silence speaks consent, not objection. If on the other hand the Executive Branch feels that the seizure of a friendly government's ships may precipitate hostilities or retortions, it may *sua sponte, with no suggestion from the aggrieved government* appear before the Court, by a proper law officer, and ask vacation of process. This was the course adopted in

Hassard *v.* United States of Mexico, et al., 29 Misc. N. Y. 511, afd. 173 N. Y. 645, *supra.*

There the United States District Attorney of the Southern District of New York, General Burnett, appearing in the State Court under instruction of the Attorney General of the United States, and expressly disclaiming representation of the defendants, moved to discharge an attachment of their property and to dismiss the action, stating, as shown by the appeal papers, the danger of such a proceeding against the property of a government at peace with our own. In the very recent case of

Oliver Trading Co. *v.* Mexico, *supra,*

the Court also held decision in abeyance, awaiting advices from the Department of State, and eventually vacated process and dismissed the complaint although, so far as the opinion shows, the Department only advised that a revolutionary government in Mexico had been recognized, that Mexico had never ceased to be an "international person," and that diplomatic relations were about to be restored without, however, making specific requests for action by the Court. In other words, the function of the executive seems to be to advise the Court that an alleged sovereign is in fact a recognized sovereign; in amity, as was done in

Mighell *v.* Sultan of Johore, *supra.*

Such information being given it is for the Court to administer the law. In this way neither branch of the government encroaches or appears to encroach upon the jurisdiction of the other. But if, as here, that sovereign's ownership and possession of seized property are conceded, and so proved without dispute or objection, the question of its immunity is one of international law for the Court.

POINT III.

The suspension of diplomatic relations between Turkey and this country, while they remained at peace with each other, did not abrogate the comity of nations or render the "Gul Djemal" subject to seizure.

THE PRINCIPLES APPLICABLE.

Rights and immunities of sovereignty can be abrogated only by treaty or by legislation; in such a case as this at Bar, for example, by an act of Congress providing that foreign government-owned vessels entering our ports for commercial purposes shall be deemed to have in all respects the status and liabilities of privately owned vessels; for Congress can, of course, if it so wishes, either exclude foreign vessels from our ports, or prescribe the terms on which they shall come in.

> *Patterson* v. *The Bark Euroda,* 190 U. S. 169.
> *Cf. The Exchange,* 7 Cranch 116.

But until such treaty be made or such legislation is enacted, the well settled rules of international law applicable to members of the society of nations prevail, because, as Chief Justice Marshall said in *The Exchange, supra,* the leading case on this subject, at page 146 (italics ours):

"It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. *But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals,* which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, *ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.*"

It was further said in *The Exchange* at page 135 (cited by Cockburn, C. J., in his judgment at the Geneva Arbitration, and cited in Sir Edward Creasy's "First Platform of International Law," p. 44):

"A nation would justly be considered as violating its faith, although that faith may not be expressly plighted, which should suddenly and without previous notice exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world."

In *The Exchange* there was no ruling upon the question whether a public war vessel loses immunity by an adventure in trade. The question was not before the Court. It now comes here "important and new."

In re Hussein Lutfi Bey, 256 U. S. 616, *supra.*

It may be noted that the great chief justice in the above excerpt spoke of this immunity as "a principle of public law." It is also referred to as a rule of "comity"; i. e. of "customary" or "voluntary" law.

International law has been defined variously. Perhaps as good a definition as any is that by Professor Geo. B. Davis in his "Elements of International Law" (editions of 1900 & 1916, page 3; also at p. 948 of his earlier work, "Outlines of International Law," 1888):

> "That body of rules and limitations which the sovereign states of the civilized world agree to observe in their intercourse and relations with each other."

"Comity" he defines (quoting from Sir Edward Creasy's "First Platform of International Law," p. 36; and citing Halleck, Woolsey, Pomeroy, Hall, Twiss, Phillimore and Walker) as "a set of courteous and convenient observances, usually followed in the conduct of states towards each other, too definite, and often too minute and conventional, to make it proper to call them moral principles. The violation or neglect of these is not considered sufficient in itself to justify war, though one state is, by such violation or neglect, often placed in an attitude of avowed ill-will and suspicion towards another state" (p. 122).

Mr. Webster defined "comity" as

> "in general terms the doctrine, that there are, *between nations at peace with one another*, rights both national and individual resulting from the comity or courtesy due from one friendly nation to another" (Works, vol. 6, p. 117—our italics).

Whether a rule is one of comity or of international law seems to depend upon how long the custom affected by it has existed.

Thus it has been said by this Court:—

> "The word 'comity' was apparently used by Lord Stowell in the Young Jacob and Johanna, (1 C. Rob. 20) as synonymous with courtesy or good will. But the period of a hundred years which had elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule or international law."
>
> *The Paqueta Habana*, 175 U. S. 694.

So Chief Justice Marshall, while saying that the slave trade was contrary to the law of nature and prohibited by the laws of most civilized nations ruled, nevertheless, that

> "This (the trade) which was the usage of all could not be pronounced repugnant to the law of nations which is certainly to be tried by the test of general usage. That which has received the assent of all must be the law of all."
>
> *The Antelope*, 10 Wheat 120, 121.

It may well be argued that the rule of comity which prescribes that a sovereign cannot be brought into court or his property taken without his consent, in time of peace, is so old, so well recognized by usage of members of the society of nations, as to have ripened into international law, which is "part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

Hilton v. *Guyot*, 159 U. S. 113, 163, 164.

Some of the reasons that have been assigned for suspending diplomatic relations could scarcely be as-

signed as reasons for abrogating comity or international politeness, as for instance "to further the cause of peace."

(International Law Situations and Topics of Discussion, 18 XVII, p. 71) and others in the list of relations suspended during the World War (Ib. 16).

The United States has not been slow to ask the recall of and even to dismiss diplomatic representatives, notably Mr. Crampton, the British Envoy, for alleged recruiting of men for the British Army in the Crimea. (Moore's Int. Dig. vol. 2, p. 3621; vol. 4, p. 553; vol. 7, p. 822; Op. Atty. Genl. vol. 7, p. 367).

The recall of the British Minister, Mr. Jackson, was also requested because of his offering offensive toasts at dinners and charging our government with "falsehood and duplicity." There are also the cases of Sackville-West, Catacazy, and others; so that it is said that the United States "has had the misfortune to supply almost all the modern instances in which a government has felt itself unable to continue relations with a minister."

Hall's International Law—Ed. 1917, pp. 315 *seq.*

In 1848 a controversy between the Duque de Sotomayer, Spanish Minister of Foreign Affairs, and Mr. Bulwer, British Minister, led to a suspension of diplomatic relations for two years (Satow's Diplomatic Practice, vol. 1, p. 378). In none of these cases do we find that the usual rules of comity were abrogated to the extent of seizing a sovereign's public vessels or barring ports to their entrance. We can find no specific discussion of the effect of interrupting diplomatic relations. It may lead to war or even be deemed a *casus belli*,—and it is quite conceivable that if, during such an interruption of civilities, one nation should seize another's vessel, retorsious and reprisals might be resorted to, and, if the vessel first seized were libelled and sold, her sovereign owner might forcibly retake her in his waters or on the high seas with resulting war.

A more extended inquiry into the effect of interrupting diplomatic relations would lead to writing a speculative treatise instead of a brief. Two recently adjudicated cases may however be referred to:

> *Wulfsohn* vs. *Russian etc. Republic,* 234 N. Y. 372, *supra.*
>
> *Russian Socialistic etc. Republic* vs. *Cibrario,* 235 N. Y. 253, *supra.*

In the former case, on appeal from orders denying a motion to vacate an attachment, the New York Court of Appeals held that our courts would not take jurisdiction of an action against an existing foreign government, whether recognized or not; that its existence was a matter of fact, which, *if conceded,* was sufficiently established to divest jurisdiction, and that courts could not bring the sovereign before them, "*not because of comity* but because he has not submitted himself to our laws. Without his consent he is not subject to them." (Citing at p. 376, *The Exchange* and other cases.) (Our italics.)

That ruling applies to the case of the *Gul Djemal.*

In the *Cibrario* case it was held that an unrecognized foreign power could not bring an action in our courts; that its power to do so is the creature of comity which is born of "recognition", and is "that reciprocal courtesy which one member of the family of nations owes to the other."

It was also held in that case, that the question was political and out of the court's jurisdiction and also (at p. 261) that, following

> *Oetjen* vs. *Central Leather Co.,* 246 U. S. 297; 303.
>
> "The principle that the conduct of one independent government cannot be successfully questioned in courts of another is as applicable to a case involving the title to property brought within the custody

of a court such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency."

Now, if the reasoning be sound, that where recognition exists and peace exists comity also must exist, then it follows necessarily that mere interruption of diplomatic relations not accompanied by war does not abrogate comity as the learned court below held.

War sanctions the seizure of enemy vessels. Severance of diplomatic relations by two sovereigns does not authorize one to seize the other's property. So to do would lead inevitably to retorsions, reprisals or war.

Counsel for the *Gul Djemal* submit that it would be a very dangerous doctrine to hold that a breach of diplomatic relations not followed by war abrogates the respective rights of the governments involved, and justifies their courts in disregarding the ordinary international immunities and privileges, included in the rule of comity.

A breach of diplomatic relations should, on the contrary, cause the courts and the executive to act with more than usual circumspection, in order to avoid bringing on war or the aggressive acts just short of war between the nations affected.

Applicability of the Above Principles to the Facts of the Case at Bar.

In November, 1914 Turkey became Germany's ally in the late war, and intrusted her interests in Great Britain to the good offices of the American Embassy at the Court of St. James.

In the same year she suspended relations with Belgium, an act which, as M. Davignon, Belgian Minister of

Foreign Affairs, wrote to the Turkish Minister in sending him his passports, the Belgian Government interpreted as in no way implying a state of war.

(International Law Situations, Topics and Discussions, Vol. XVII, p. 69, published by Naval War College.)

Thereupon Belgian interests were intrusted to the American Ambassador at Constantinople.

On February 3d, 1917 the United States severed relations with Germany, Turkey's ally, but not with Turkey; and on April 8th declared war on Germany; that constituted a recognized ground for Turkey's severing diplomatic relations, as she did, on April 20th, following, but without declaring war; on the contrary she, as here stipulated, ordered her people to observe American rights; the interests of the United States in Turkey being entrusted to the Swedish Legation at Constantinople, those of Turkey in the United States to the Spanish Ambassador at Washington.

Following the Armistice in 1919, American interests in Turkey have been represented, as here stipulated, informally by an American High Commissioner and those consuls who returned to their posts.

(Letter of Department to appellant's counsel, page 63 of record in re Lutfi Bey, 256 U. S. 616. Also Department's public statement on August 5th, 1923, when releasing to the press for publication on August 7th a summary of the pending Treaty of Amity with Turkey—"Current History" for October, 1923, p. 100.)

At the time of the *Gul Djemal's* arrest, Turkey remained as she had been for years, a *recognized* sovereign state, an "international person." She was, and now is, a member of the society of nations, to which she was admitted under the Treaty of Paris by the great powers in 1856.

President Jackson promulgated our first commercial treaty with her in 1832, thirty-four years before the

Treaty of Paris; President Grant the Protocol of 1874. Whether the Treaty of 1862 ceased to be operative was disputed.

Notes to Compilation of Treaties by the State Department 1889, page 1372.

But the United States continued to receive most favored nation treatment, and diplomatic relations between the two countries were maintained until April 20th, 1917. "Recognition" of Turkey by the United States is no more needed to establish her status than was recognition of Spain after the Spanish war, or of Great Britain in 1856, after dismissal of her Minister, Mr. Crampton.

"Treaties do not generally *ipso facto* become extinguished by war. Valid rights of property do not become divested."

State Department's Compilation of Treaties, p. 1228, VII, citing *Society etc.* v. *Town of New Haven* 8 Wheaton 464, *Carneal* v. *Banks* 10 Wheat. 182; (but see contrary British position adopfed by President Polk in the Mexican War, same compilation 1237.)

Still less will severance of formal diplomatic relations between two nations, not followed by war, affect their relative status and rights in the family of nations and, between them, abolish the operation of fundamental principles of international law and comity.

Our treaty relations with Turkey continued despite severance of diplomatic relations.

On August 6th, 1923, twenty-five days before the recognition of the new Mexican Government above referred to, a new treaty was signed at Lausanne by representatives of the United States and Turkey. Its preamble recites that its purpose is to regulate the conditions of intercourse between the United States and Turkey and to define the rights of their respective nationals in the territory of the other "in accordance with the principles of international law and on the basis of reciprocity". Both the Turkish and Mexican treaties await ratification.

The abolition of the capitulations alone would have necessitated a new treaty; and the above recital of the preamble differs notably from that of our Treaty with Germany, signed at Berlin on August 15th, 1821, which describes the document as "A Treaty to restore the friendly relations existing between the two nations prior to the outbreak of the war". The implication from this difference is that friendly relations had been severed with Germany but not with Turkey. And the reason for such severance of relations as had existed with Turkey, our declaration of war upon her ally, ceased with promulgation of the peace treaty with Germany on November 11th, 1921, if not with the treaty of Versailles.

Finally on August 7th, 1923 the Department of State released to the press a summary of the Treaty accompanying it with a statement that the United States was not a party to the Treaty of Sevres and although represented at Lausanne upon the invitation of the allied powers, yet *"as the United States had not been at war with Turkey and was not negotiating a treaty of peace with that country, this Government did not become a party to the allied treaty"*.

That summary shows that the United States is assured treatment as favorable as that accorded to any other nation, *Current History*, October, 1923; *Article on The Turco-American Treaty*, page 100 *seq.*

It is submitted therefore that *as we have not been at war with Turkey the suspension of diplomatic relations did not, as the learned Court below held, abrogate in time of peace the accepted rule that a sovereign cannot be sued nor can his property be seized without his consent and the peace of nations thereby vexed.*

The present status seems to be the same as, or better than, that with Mexico. Treaties with each are pending. In principle, neither should be preferred.

POINT IV.

The decree appealed from should be reversed, the process against the Gul Djemal and the bond given for her vacated and she should be declared immune.

Respectfully submitted,

New York, 22d November, 1923.

WILLIAM A. PURRINGTON,
JOHN M. WOOLSEY,
FRANK J. MCCONNELL,
of Counsel.

THE "GUL DJEMAL."[1]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 83. Argued January 4, 1924.—Decided February 18, 1924.

The objection that a vessel, owned, possessed, manned, and operated by a foreign State, but engaged in ordinary commerce under charter to a private trader, is immune to libel in the District Court for services and supplies, can not be raised by her master, who, although a naval officer, is not functioning as such, and is not shown to have authority to represent his sovereign in making the objection. P. 94.

296 Fed. 567, affirmed.

APPEAL from a decree of the District Court sustaining a libel against a ship, for services and supplies.

Mr. William A. Purrington and *Mr. John M. Woolsey*, with whom *Mr. Frank J. McConnell* was on the brief, for appellant.

Mr. Oscar R. Houston, with whom *Mr. Ezra G. Benedict Fox* was on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Seeking to recover for supplies and services furnished at New York during November, 1920, in order to fit her

[1] The docket title of this case is: *Steamship "Gul Djemal," her engines, etc.; Hussein Lutfi Bey, Master*, v. *Campbell & Stuart, Inc.*

for an intended voyage across the Atlantic, appellee libeled the steamship *Gul Djemal* and caused her arrest under the ordinary admiralty practice. Her master, appearing for the sole purpose of objecting to the court's jurisdiction, claimed immunity for the vessel because owned and possessed by the Turkish Government, and asked that she be released. No one except the master has advanced this claim.

The parties stipulated:[1] The Turkish Government and the United States are at peace with each other, but diplomatic relations have been severed. The *Gul Djemal* is the absolute property of the Turkish Government and under the administration of the Transport Section of the Ministry of Marine. That government employed and

[1] "First: That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was owned by the Turkish or Ottoman Government, that it flies the Turkish flag; that Turkey has but one flag, for both national and commercial uses; that it is registered in the name of Seire-Seffain Administration; that the *Gul Djemal* is the absolute property of the Ottoman Seire-Seffain Administration, the third division of the Ministry of Marine of the Turkish Government, which is attached to the Ministry of War; that the maritime title has been given to the Administration Seire-Seffain by the Ministry of War. Said Seire-Seffain Administration, at the times above mentioned, was (and is) the Transport Section of the Ministry of Marine, and was (and is) charged with the control of transport vessels of the Turkish Government, and said vessels, (of which the *Gul Djemal* was one) which are capable of commercial uses, are, when not used as transports, used in commerce; whether such vessels are used as transports or in commerce is subject to the direction of the Ministry of Marine, which, through departments other than the Seire-Seffain, has charge of battleships, artillery, torpedoes, wireless, and engineering work pertaining to all the vessels of the Turkish Navy; that the *Gul Djemal* was transferred for operation to the Administration Seire-Seffain from the Ministry of War in 1914 and has since been under the control of Administration of Seire-Seffain.

"Said Seire-Seffain Administration, at the times above mentioned, had (and has), as its head, a military officer of the Turkish Govern-

paid the master, officers and crew—the master being a reserve naval officer—and was in possession of the ship when arrested. She "was engaged in commercial trade, under charter for one round voyage to George Dedeoglou, who engaged to carry passengers and goods for hire, and in such trade the *Gul Djemal* was not functioning in a naval or military capacity, nor was there anything of a naval or military character connected with the voyage of the *Gul Djemal* from Constantinople to New York and return."

The court below denied the alleged immunity and passed a decree for the libellant. Upon this direct appeal only the question of jurisdiction is presented. The relevant certificate follows:

"The sole question raised by the answer of the claimant herein, and the sole issue before this court, was the juris-

ment, in the active or reserve service of the Turkish Government, and said head must be, at all times, a military officer in the employ of the Turkish Government, the Seire-Seffain Administration being charged with the transport of troops, and at all the times above mentioned, said head of the Seire-Seffain Administration was a Colonel; although said head of the Seire-Seffain Administration, at the times above mentioned, was, in respect of the *Gul Djemal*, not functioning in a military or naval capacity.

"Second: That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was in the possession of the Turkish Government, being manned by a master, officers and crew employed by or under the direction of said Seire-Seffain Administration, and paid by the Treasury Department of the Turkish Government through the Administration Seire-Seffain; said master, at the times above mentioned, was (and is) a reserve officer in the Turkish Navy employed by the branch of the Ministry of Marine known as the Administration Seire-Seffain, and the navigating officer was a Lieutenant in the active service of the Turkish Navy, both detailed by the said Ministry of Marine to serve on the *Gul Djemal* during the times above mentioned, but in such service they were not performing any naval or military functions, although they were subject to any orders from the department of the Turkish Government charged with naval or military affairs; the other officers

diction of the court over the steamship *Gul Djemal*, a vessel owned, manned, operated by and in the possession of the sovereign government of Turkey, at peace with the Government of the United States of America. The allegations of the libellant that it had furnished supplies to the vessel, were admitted by the claimant, whose answer set up that the vessel was immune, as a sovereign owned vessel, from the process of this court, and that the vessel was not within the admiralty and maritime jurisdiction of this court. I have granted a decree for the amount prayed for by the libellant, and have denied immunity to the vessel because at the time the cause of action and

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and entire crew of the *Gul Djemal*, during the times above mentioned, were civilians, paid by the Turkish Government.

"Third: That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was engaged in commercial trade, under charter for one round voyage to George Dedeoglou, who engaged to carry passengers and goods for hire, and in such trade the *Gul Djemal* was not functioning in a naval or military capacity, nor was there anything of a naval or military character connected with the voyage of the *Gul Djemal* from Constantinople to New York and return.

"Fourth: That the Turkish Government, prior to the time mentioned in the libel herein, had severed diplomatic relations with the United States of America, advising its peoples by proclamation, however, that American institutions should not be molested but should be treated as heretofore; that said diplomatic relations have not been resumed; although the United States of America maintains unofficial relations with the Turkish Government by American Consular representatives, and through the medium of a High Commissioner; that during said period of the severed relations, the Spanish Ambassador to the United States has represented, and still represents, Turkish interests in the United States, and has been recognized as such representative by the Department of State of the United States of America.

"Fifth: That the Turkish or Ottoman Government, and the Government of the United States of America, are sovereign governments, and were at all the times mentioned herein, at peace with each other, although the Turkish or Ottoman Government was and is an ally of the enemy of the United States in the World War."

liability on which the libel is founded were created, and at the time the vessel was seized under process of this court, she was, although owned, manned by and in the possession of the sovereign government of Turkey, engaged in commercial trade, under charter for hire to a private trader; and furthermore, because diplomatic relations between the United States and Turkey were then severed and no appropriate suggestion was filed from the State Department of the United States."

Appellee maintains that whatever may be the proper rule in our courts concerning the ultimate immunity of vessels owned by foreign governments and employed in ordinary trade and commerce, such immunity will not be granted upon the mere claim of the master, especially when the United States has no diplomatic relations with the sovereign owner. Such claim can be made only by one duly authorized to vindicate the owner's sovereignty. *Ex parte Muir*, 254 U. S. 522, 532, 533, is relied upon to support this view. It is there said—

"As of right the British Government was entitled to appear in the suit, to propound its claim to the vessel and to raise the jurisdictional question. . . . Or, with its sanction, its accredited and recognized representative might have appeared and have taken the same steps in its interest. . . . And, if there was objection to appearing as a suitor in a foreign court, it was open to that government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction."

Treating *Ex parte Muir* as relevant, appellant insists that within the meaning of the declaration there made the master of the *Gul Djemal*, a duly commissioned officer of

the Turkish Navy, was the accredited and recognized representative of that government, possessed of adequate authority to protest against the seizure and object to the court's jurisdiction.

We agree with the view advanced by the appellee. *The Anne*, 3 Wheat. 435, reaffirmed by *The Sao Vicente*, 260 U. S. 151, is enough to show that the immunity could not have been successfully set up by a duly recognized consul, representative of his sovereign in commercial matters, in the ordinary course of his official duties, and there seems no adequate reason to presume that the master of the *Gul Djemal* had any greater authority in respect thereto. Although an officer of the Turkish Navy, he was performing no naval or military duty, and was serving upon a vessel not functioning in naval or military capacity but engaged in commerce under charter to a private individual who undertook to carry passengers and goods for hire. He was not shown to have any authority to represent his sovereign other than can be inferred from his position as master and the circumstances specified in the stipulation of facts.

Affirmed.

MR. JUSTICE HOLMES concurs in the result.